

Albany  
Atlanta  
Brussels  
Denver  
Los Angeles

**McKenna Long  
& Aldridge**  
Attorneys at Law

1900 K Street, NW • Washington, DC 20006  
Tel: 202.496.7500 • Fax: 202.496.7758  
www.mckennalong.com

RECEIVED  
FEDERAL ELECTION  
COMMISSION

2010 JUN -1 AM 10:05

OFFICE OF GENERAL  
COUNSEL

New York  
Philadelphia  
San Diego  
San Francisco  
Washington, D.C.

CHARLES R. SPIES  
(202) 496-7878

EMAIL ADDRESS  
cspies@mckennalong.com

June 1, 2010

Ms. Thomasenia Duncan, General Counsel  
Federal Election Commission  
Office of the General Counsel  
999 E Street, NW  
Washington, DC 20463

MUR # 6306

**RE: Complaint against Sharron Angle and Friends of Sharon Angle, for accepting an illegal corporate in-kind contribution through use of a corporate airplane for campaign purposes.**

Complainant Sue Lowden for US Senate Senate, Charles R. Spies, Counsel, hereby submits this Complaint, pursuant to 2 U.S.C. § 427(g) and 11 CFR § 111.4, against Respondents Sharon Angle and Friends of Sharon Angle (FEC ID # C00460758).

**I. Facts**

According to a recent article published by the *Las Vegas Review-Journal*, on March 27 and 28, 2010 Mrs. Angle flew between campaign stops on an six-seat airplane owned by DLR Ventures, LLC, a Nevada-based limited liability corporation. See Attachment A ["Questions Surround Angle's Trip Aboard Supporter's Plane," *Las Vegas Review-Journal*, May 28, 2010] The charter rate for a comparable plane of comparable size on the same itinerary was estimated at \$7,000. *Id.* Angle acknowledged that she did not reimburse the corporation, DLR Ventures, LLC, for the charter rate, but instead paid only \$67.54 for a partial share of the cost for "fuel and

10044283110

parking." *Id.* In addition, no payment at all to the corporation that owns the airplane, DLR Ventures, LLC, is reflected on Mrs. Angle's FEC Report for the relevant time period of the flights reported on in the newspaper. See Friends of Sharon Angle 12-Day Pre-Primary Report, dated May 25, 2010.

## II. Legal Analysis

If a campaign uses an aircraft that is not operated for commercial service, including a corporate aircraft, it must comply with Title VI, section 601 of the Honest Leadership and Open Government Act of 2007 (*HLOGA*) (Pub. L. No. 110-81, 121 Stat. 735). This law, which took effect immediately after it was signed into law in 2007, significantly restricts air travel by federal candidates and officeholders. Under *HLOGA*, a candidate for US Senate and her campaign may not use campaign funds for air travel unless the flight is on a commercial air carrier and subject to air carrier safety rules, or the pro rata share of the fair market value of the flight is reimbursed. This rule is explained in plain language in the *Federal Election Commission Campaign Guide - Congressional Candidates and Committees*, Chapter 10, Sec. 4, April 2008. Further clarification was provided on December 7, 2009, when the Federal Election Commission ("FEC" or "Commission") promulgated new and revised rules implementing the provision of *HLOGA* governing non-commercial campaign travel on aircraft. See Attachment B [*Final Rules Regarding Use of Campaign Funds for Non-Commercial Travel*, 74 FR 63951, December 7, 2009]. The effective date for those regulations was January 6, 2010, and these new regulations make clear that "non-commercial air travel" means, "any travel aboard any aircraft that is not (1) operated by an air carrier or commercial operator certified by the Federal Aviation Administration and (2) the flight is required to be conducted under air carrier safety rules..." 11

10044283111

10044283112

CFR Sec. 100.93(a)(3)(v). The new regulations specify that reimbursement for non-commercial air travel must be made to the service provider by the relevant committee within a "commercially reasonable time frame," which is defined to mean within seven (7) days from the date of the flight. If such reimbursement does not take place within seven days, then the campaign has received an in-kind contribution for the fair market value of the flight. Specifically, the Act defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR 100.52(a). The phrase "anything of value" encompasses "the provision of any goods or services without charge or at a charge that is less than the normal and usual charge for such goods or services." 11 CFR 100.52(d)(1). When goods or services are provided at less than the usual and normal charge, "the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee." *Id.*

As a result, a candidate that does not make a timely reimbursement for a flight has received an in-kind contribution from the provider of such flight, in this case DLR Ventures, LLC. Such an in-kind contribution from a corporation such as DLR Ventures, LLC is legally prohibited. *See* 2 U.S.C. 441b, 441c, and 441e; 11 CFR 110.20, 114.2(b), and 115.2.

One of the most basic rules of legal compliance for federal elections in the United States of America is that corporate contributions, whether direct or in-direct, are prohibited. This prohibition is almost a century old, and is of course codified in the Federal Election Campaign Act of 1971, as amended (the "Act"). The Act prohibits corporations from making contributions

and expenditures in connection with any federal election. 2 U.S.C. § 441b(a). The Act defines contribution or expenditure to include "anything of value" to any candidate. 2 U.S.C. § 441b(b)(2). The value of a charter airplane flight is certainly something "of value" under the Act, and consequently the charter rate of at least seven thousand dollars (\$7,000) for a "comparable plane of comparable size" to the one used by Mrs. Angle and her campaign must be treated - and reported<sup>1</sup> - as an in-kind contribution to Friends of Sharon Angle. It is not surprising, however, that Mrs. Angle did not report this contribution, as doing so would expose a clear violation of the prohibition against corporate contributions found at 2 U.S.C. § 441b(a).

These clear violations of federal law were apparently not committed by a low-level staff member of Mrs. Angle's Senate campaign, but instead by Mrs. Angle herself, who was personally flying on the airplane in question. Under the Act, no person, including a political committee and/or a candidate, may knowingly accept or receive a corporate contribution. 2 U.S.C. § 441b(a). Sharon Angle is a frequent candidate for various offices, who most recently in 2006 ran a failed campaign for United States Congress against now-Congressman Dean Heller. Consequently, Mrs. Angle is presumed to know and understand the clear prohibition in Federal law against using corporate funds to subsidize a campaign for Federal office. It therefore would strain credibility for anyone to assert that Mrs. Angle did not knowingly facilitate and accept a corporate contribution, in violation of 2 U.S.C. § 441b(a). Alternatively, however, even if the in-kind contribution was from a permissible source such as an individual, that contribution would

---

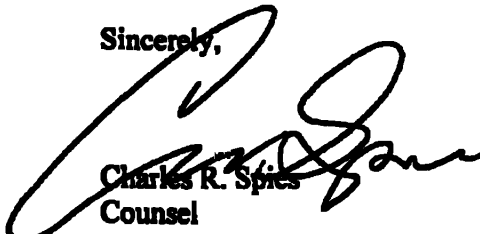
<sup>1</sup> Under the Act, each report filed by a political committee must disclose contributions to, and disbursements by, the committee. 2 U.S.C. § 434(b).

still be subject to the contribution limits of the Act and Commission regulations. See 2 U.S.C. 441a-441k; 11 CFR parts 110, 114, and 115.

### III. Conclusion

We hereby respectfully request that the Commission investigate the crimes outlined above, mandate the full disclosure of any corporate in-kind contributions by DLR Ventatus, LLC to Mrs. Angle and her campaign committee, and penalize Mrs. Angle and her committee accordingly for their violations of clear Statutes and Regulations prohibiting the acceptance of an un-reimbursed non-commercial flight.

Sincerely,



Charles R. Spies  
Counsel  
Sue Lowden for US Senate

District of Columbia

Signed and sworn to (or affirmed) before me on June 1, 2010

By: Charlie R. Spies  
Name(s) of Person(s)

Notary Public:

Tara Kim Eberhart

My Commission Expires: May 14, 2012

TARA KIM EBERHART  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires May 14, 2012

10044283114

ATTACHMENT A

reviewjournal.com

PRINT THIS

Powered by Clickability

May. 28, 2010  
Copyright © Las Vegas Review-Journal

## Questions surround Angle's trip aboard supporter's plane

By LAURA MYERS  
LAS VEGAS REVIEW-JOURNAL

When Sharron Angle hitched a ride on a supporter's plane to rally Tea Party troops at the "Showdown in Searchlight" in Harry Reid's hometown, the rising Republican candidate hoping to replace the U.S. senator might have violated campaign finance rules.

Angle paid \$67.54 to reimburse the owner and pilot for fuel and parking for several legs of the trip that she and a couple shared on the six-seat, single-engine Cherokee Piper on March 27 and 28, according to records her campaign released to the Las Vegas Review-Journal. Passengers picking up equal shares of the transport tab is in line with Federal Aviation Administration rules.

But after questions were raised about whether Angle as a candidate should have paid a charter rate estimated at \$7,000 or more, her campaign said Friday it sought a legal opinion and decided to pay a higher charter plane fare to ensure full compliance with the Federal Election Commission.

The campaign declined to release the amount of the payment.

"Sharron pays for her own trips and so there was no free ride," said Jerry Stacy, spokesman for Angle's campaign. "And this is not a corporate jet. This is a private plane being flown by a private person. We thought we were doing the right thing and following all the rules."

Confusion and mishandling of campaign finance has tripped up several candidates, especially Angle and Sue Lowden, now running neck and neck for the GOP nomination in the June 8 primary. Danny Tarkanian also is a top GOP contender to face the Democratic incumbent Reid in November.

Lowden has her bus problem with the Democratic Party filing a complaint with the FEC, accusing her of accepting an illegal donation of a luxury RV that sports her photo and acts as a campaign billboard as she travels the state. Lowden says the bus is leased and in compliance with the law.

Now Angle has her plane problem, which the Lowden campaign seized on as the hotly contested GOP primary plays out its last days heading into the June 8 final vote.

"You can't portray yourself as a candidate in a pickup truck when you're taking private planes across the state," Lowden campaign manager Robert Uthoven said, referring to Angle driving herself around to events in her own pickup, which is featured on her campaign website.

Uthoven said the private plane travel is the latest example of Angle's campaign not properly disclosing contributions, payments and debts -- problems the Angle campaign has attributed to computer software glitches and other accounting errors in its reports dating back to late 2009.

"Sharron Angle was over a year late in filing a legally required financial disclosure form, and she still hasn't accounted for the nearly \$100,000 of missing debt from previous FEC filings," Uthoven

10044283115

said. "It's hard to read her record when she tries to keep it closed."

Stacy dismissed the criticism, saying Angle opponents are playing a "gotcha game."

"This should be about how to defeat Harry Reid, and it kind of sickens me that people are trying to bring down this campaign," Stacy said after battling a series of national stories trying to link Angle to Scientology and other controversial ideas to make the conservative appear unelectable.

In Angle's case, the flights came during a busy time for the former Reno assemblywoman, whose campaign was heating up as she wooed the Tea Party movement for support, including at the anti-Reid gathering in Searchlight attended by 8,000 to 10,000 people.

Ed Rathje, a Reno supporter and private pilot, offered to fly Angle to Searchlight and several events before and after the gathering, which came two weeks before she won the Tea Party Express endorsement. His plane is registered under DLR Ventures LLC, a limited liability corporation he owns.

An Incline Village couple, Steve and Denise Ause, jumped on board, too, after meeting Rathje through GOP contacts the day before the Searchlight event. They, too, paid their share, \$224.58 for the whole trip, according to records released by the Angle campaign.

The Piper left the Reno-Stead Airport on March 26 with the Ause couple and another man on board. They met Angle in Henderson that evening as she did a radio interview with Roger Hedgecock.

On March 27, Angle, a campaign worker and the couple flew together from Henderson to Bullhead City, Ariz., then to Searchlight for the main event, then returned to Henderson. Angle's campaign worker chipped in \$20.40 to cover his share of that leg of the trip, the records show.

On March 28, Angle and the Ause couple flew home, from Henderson to Reno-Stead.

"We had a wonderful time, and Ed kept a whole log and kept track of what everybody owed," Denise Ause said in an interview. "He was keeping everything right down to the penny."

Steve Ause said the couple, who are active in Republican politics, were early backers of Lowden because they saw her as the best GOP bet to beat Reid in the fall. But once they got to know Angle, mostly through the Searchlight trip, they switched allegiance to the Tea Party favorite.

"For a while we were going with Sue because she was the front-runner and it was just all about how do we get rid of Harry Reid," Steve Ause said. "But when we got to know Sharron and her campaign took off, we felt she was really the better candidate, and we think she can win."

The Auses also are supporting Gov. Jim Gibbons for re-election, although the Republican has had a series of personal problems, including a divorce, that leave many to believe he will win the primary.

Stacy said Angle had complied with FAA rules that allow only pre-rated reimbursement of plane operating costs for private pilots when they carry passengers. But another lawyer who deals in FEC regulations advised the Angle campaign that federal finance rules supersede the FAA in this case, allowing the private pilot to accept charter fees without risking the loss of his license.

"So the bottom line is this: The campaign prefers to take the safe-than-sorry route, and the treasurer has been instructed to make an additional immediate payment to the pilot that reflects the going rates for chartered flights and file an updated report with the FEC," Stacy said.

The Angle campaign also plans to seek an advisory opinion from the FEC to clarify any potential

10044283116

conflicts between the FEC and FAA rules about private flights, Stacy said.

"The plane is a 44-year-old, single-engine Cherokee Piper, and the chartered rates versus pro-rata rates are not expected to show much of a noticeable difference concerning disbursements paid out for the usage of a plane this old," said Stacy, who would not give an exact reimbursement figure.

In 2007, the law was changed to prevent federal candidates from accepting free rides on corporate jets, said Craig Holman, a campaign finance expert with Public Citizen, a watchdog group. Candidates must fly commercial or must charter planes at the market rate, he said.

"They have to pay their pro-rated share of the charter flight," Holman said. "The whole spirit of the law is to get candidates off corporate jets. We're just starting to see violations beginning to happen."

Contact reporter Laura Myers at lmyers@reviewjournal.com or 702-387-2919.

**Find this article at:**

<http://www.rvj.com/news/questions-surround-angle-s-trip-aboard-supporter-s-plane-95165209.html>

☐ Check the box to include the list of links referenced in the article.

Copyright © Las Vegas Review-Journal, 1997 - 2008

Go Green! Subscribe to the electronic Edition at [www.reviewjournal.com/ee/](http://www.reviewjournal.com/ee/)

10044283117



# Rules and Regulations

Federal Register

Vol. 74, No. 233

Monday, December 7, 2009

ATTACHMENT B

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 113, 9004, 9034

[Notice 2009-27]

### Campaign Travel

AGENCY: Federal Election Commission.

ACTION: Final rules.

**SUMMARY:** The Federal Election Commission is promulgating new and revised rules implementing the provision of the Honest Leadership and Open Government Act governing non-commercial campaign travel on aircraft. These changes restrict, and in some situations prohibit, Federal candidates and certain political committees from expending campaign funds for non-commercial air travel. The rules apply to all Federal candidates, including publicly funded presidential candidates and other individuals traveling on behalf of candidates, political party committees, and other political committees, where the travel is in connection with Federal elections.

**DATE:** The effective date for the amendments to 11 CFR parts 100, 113 and 9004 is January 5, 2010. Further action on amendments to 11 CFR part 9034, including the publication of a document in the Federal Register announcing an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 25 U.S.C. 9009(c).

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Assistant General Counsel, Ms. Joshua S. Blum, Attorney, or Mr. Jonathan B. Wildstein, Attorney, 999 E Street, NE, Washington, DC 20048, (202) 694-2640 or (202) 424-2530.

**SUPPLEMENTARY INFORMATION:** The Commission is promulgating several changes to its rules in order to implement section 601 of Public Law 110-81, 121 Stat. 735, the "Honest

Leadership and Open Government Act of 2007" ("HLOGA"). This provision of HLOGA became effective upon enactment on September 14, 2007. HLOGA amended the Federal Election Campaign Act of 1971, as amended (5 U.S.C. 431 et seq.) ("the Act") by restricting, and in some cases prohibiting, the expenditure of campaign funds by candidates for Federal office for non-commercial travel aboard aircraft. See 2 U.S.C. 431a(c).

The Commission is implementing this provision of HLOGA by adding new § 113.5 to 11 CFR Part 113, which governs the expenditure of campaign funds by candidates for Federal office and their authorized political committees. In addition, the Commission is promulgating revisions to 11 CFR 100.68, which establishes an exception to the definition of "contribution" for non-commercial travel aboard aircraft by, or on behalf of, Federal candidates and political committees, if the candidates and political committees reimburse the service providers at specified rates. The revisions to 11 CFR 100.68 apply to campaign travel by, or on behalf of, candidates for Federal office or leadership PACs of House candidates. As discussed below, the rules leave in place the required reimbursement rate structure imposed under the Commission's 2003 rules for travel by persons on behalf of other political committees, such as the staff of a political party committee, a nonconnected political committee, or a leadership PAC of a Senate or Presidential candidate. The revisions to 11 CFR 100.68 are also incorporated by reference into the Commission's rules governing travel by publicly funded presidential candidates. The changes in these final rules, however, do not substantively alter the Commission's treatment of travel by means of transportation other than aircraft, or of travel aboard commercial airlines or charter flights.

The Notice of Proposed Rulemaking ("NPRM") on which these final rules are based was published in the Federal Register on October 23, 2007. 72 FR 59653 (Oct. 23, 2007). The comment period closed on November 13, 2007. The Commission received eight comments from eleven commenters.<sup>1</sup>

<sup>1</sup> These comments included a written comment from the House of Representatives and the Senate.

The comments are available at [http://www.fec.gov/law/law\\_makings/notice/2007](http://www.fec.gov/law/law_makings/notice/2007). Because no commenters requested the opportunity to testify, the Commission did not hold a hearing on this rulemaking.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the Federal Register at least thirty calendar days before they take effect. In addition, 25 U.S.C. 9009(c) requires that any rules or regulations prescribed by the Commission to carry out the provisions of the Presidential Election Campaign Fund Act be transmitted to the Speaker of the House of Representatives and the President of the Senate thirty legislative days before they are finally promulgated. The final rules that follow were transmitted to Congress on November 24, 2009.

## Explanation and Justification

### I. Background

#### A. Statutory and Regulatory Framework

The Act defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 631(8)(A)(i); see also 11 CFR 100.52(a). The phrase "anything of value" encompasses "the provision of any goods or services without charge or at a charge that is less than the normal and usual charge for such goods or services." 11 CFR 100.52(d)(1). When goods or services are provided at less than the usual and normal charge, "the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee." Id.

As a result, candidates who travel aboard a commercial airliner or other conveyance for which a fee is normally charged must pay the usual and normal charge for that service to avoid receiving an in-kind contribution from the person

and thereby conflict between its regulations and the Commission's proposed rules.

1004283118

providing the travel service. Such in-kind contributions would be prohibited if provided by certain entities, including corporations, labor organizations, Federal contractors, and foreign nationals. See 2 U.S.C. 447b, 447c, and 441e; 11 CFR 100.99, 100.104(b), and 100.105. If the in-kind contributions are from permissible sources, they nevertheless would be subject to the contribution limits of the Act and Commission regulations. See 2 U.S.C. 441a-441d; 11 CFR parts 100, 104, and 105.

#### 1. Formulation of 11 CFR 100.93 in 2003—Payment for Non-Commercial Travel

The usual and normal charge for travel aboard a commercial aircraft is the publicly available price for a ticket, and the usual and normal charge for a chartered aircraft is the publicly available charter or lease rate. The usual and normal charge for travel aboard a non-commercial flight, however, may not be as apparent. For example, there is generally not a ticket price for a seat aboard a non-commercial aircraft that may be operated primarily for the travel of the owner and invited guests. Because candidates for Federal office traveled on these privately operated aircraft, the Commission's regulations provided specific guidance about the rate of reimbursement that candidates and officers had to pay to avoid receiving an excessive or a prohibited in-kind contribution for travel aboard such aircraft.

On December 15, 2003, the Commission promulgated final rules adding 11 CFR 100.93. See Final Rules and Explanation and Justification for Travel on Behalf of Candidates and Political Committees, 68 FR 89583 (Dec. 15, 2003) ("2003 travel rules" or "2003 ERF"). The 2003 travel rules established an exception from the definition of "contribution" for payments at specified rates for non-commercial travel in connection with a Federal election. Under the 2003 travel rules, the payment required for non-commercial air travel varied among the first-class, coach, or charter rate, depending on whether the travel occurred between cities served by regularly scheduled commercial airline service and whether that service was available at a first-class or coach rate. See 11 CFR 100.93(a)(1)(i) and (ii) (2004).

#### 2. Revisions to 2003 to 11 CFR 100.93 and 100.94.—Travel by Presidential and Vice-Presidential Candidates Amongst Public Funds

(Candidates in the presidential primary elections may qualify to receive

partial public funding in the form of matching payments from the Federal government. Additionally, presidential general election candidates may qualify to receive outright grants of public funds. In both cases, the presidential candidates must agree, among other things, to use the public funds they receive solely for "qualified campaign expenses" and not to exceed specified expenditure limits. 2 U.S.C. 441a(b)(1)(A) and (B); 68 U.S.C. 9002(a) and (c), and 9003(b).

As part of the 2003 travel rules, the Commission promulgated separate regulations at 11 CFR 9004.7(b)(5)(i), (v), and (b)(8), and 9004.7(b)(9)(i), (v), and (b)(8), setting forth the appropriate reimbursement rates that publicly funded candidates must use for campaign-related travel on non-commercial transportation. While 11 CFR 100.93 treats the underpayment for travel as an in-kind contribution, 11 CFR 9004.7 and 9004.7 address the extent to which payments for campaign-related travel constitute "qualified campaign expenses." The 2003 travel rules revised the rates and recordkeeping requirements for presidential and vice-presidential candidates accepting public funds to conform them to the new rates in 11 CFR 100.93.

#### II. Revisions to 2 U.S.C. 432a—Use of Campaign Funds

HLOGA amended the Act to prohibit House candidates, their authorized committees, and their leadership PACs<sup>2</sup> from making any expenditure<sup>3</sup> for non-commercial travel on aircraft, with an exception for travel on government-operated aircraft and aircraft owned or leased by a candidate or an immediate family member of the candidate. See 2 U.S.C. 432a(c)(5) and (5). HLOGA also specified new reimbursement rates that presidential, vice-presidential, and Senate candidates must pay for non-commercial campaign travel on aircraft. See 2 U.S.C. 432a(c)(4). The reimbursement rates for these types of travel differ from those contained in the

<sup>2</sup> The NFRM proposed a definition of "leadership PAC" to implement section 2004 of HLOGA, 2 U.S.C. 434(d)(2)(B). NFRM at 10004-05, 10004. The Commission subsequently adopted a definition of "leadership PAC" at 11 CFR 100.103(a)(1) as part of a separate rulemaking proceeding regarding of regulations to limit the use of lobbyists, lobbyists and the PACs of lobbyists and legislators. See Reporting Contributions Funded by Lobbyists, Legislators and the PACs of Lobbyists and Legislators, 74 FR 7288, 7288 (Feb. 19, 2009). This definition became effective on March 10, 2009. Accordingly, the definition of "leadership PAC" is not identical to those final rules.

<sup>3</sup> An "expenditure" includes any payment "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 4351(a)(1).

Commission's 2003 travel rules, which addressed non-commercial travel on aircraft by all political committees, including political party committees, separate segregated funds, nonconnected political committees, and other political committees. HLOGA did not, however, affect campaign travel on commercial flights, which all candidates must still reimburse at the "usual and normal charge." See 11 CFR 100.93(a) and (d), and 100.93(a)(2).

#### III. Revisions to 11 CFR 100.93—Travel by Aircraft on Other Means of Transportation

The Commission is amending 11 CFR 100.93 to implement HLOGA's provisions requiring candidates and certain political committees to pay for non-commercial air travel at a specified rate to avoid the receipt of an excessive or a prohibited in-kind contribution.<sup>4</sup>

The Commission is otherwise retaining 11 CFR 100.93 intact, except as identified below. The explanations for the purpose and provisions of 11 CFR 100.93 were set out in the 2003 ERF and continue to apply unless addressed in the following discussion in the NFRM. The Commission sought comments on the overall structure of 11 CFR 100.93. None of the commenters called for a change in the structure or general function of the section.

#### A. 100.93(a)—Scope and Definitions

The Commission is changing the scope and definitions in 11 CFR 100.93(a) as noted below. First, for internal consistency, the Commission is replacing all references to "airplane" in 11 CFR 100.93 with the term "aircraft." HLOGA uses the term "aircraft," which the Federal Aviation Authority (FAA) defines as "a device that is used or intended to be used for flight in the air."

<sup>4</sup> The intent of section 2004 of HLOGA was frequently characterized by its sponsors as an effort to end subsidization of air travel provided by corporations and others to candidates, with thereby reducing the potential for corruption on the appearance thereof. See, e.g., 183 Cong. Rec. S263 (daily ed. Jan. 1, 2007) (statement of Sen. Obama) ("It would be one thing if Congressmen and Senators paid the full rate for these flights, but we don't"), 183 Cong. Rec. S267 (daily ed. Jan. 9, 2007) (statement of Sen. Feingold) ("Any legislation on corporate jets must include campaign trips as well as official travel because one thing is for certain—the lobbyist for the company that provides the jet is likely to be on the flight, whether it is taking you to see a factory back home or a Senator for your campaign."), 183 Cong. Rec. S268 (daily ed. Jan. 10, 2007) (statement of Sen. Lieberman) ("When a Member of Congress or a candidate for Federal office uses a private plane, the ethics rules, as well as the Federal Election Commission rules, require payment to the owner of the plane equivalent to a first-class commercial ticket."). The final amendment would eliminate that loophole. • • • • • 183 Cong. Rec. S268 (daily ed. Aug. 2, 2007) (statement of Sen. Obama).

14 CFR 1.1. The term "aircraft" includes helicopters, which the Commission's 2003 travel rules had grouped with buses and conveyances other than airplanes. See 11 CFR 100.93(a)(3)(ii) (2004) (definition of "service provider" focuses on "person who makes the airplane or other conveyance available"), 11 CFR 100.93(a) (2004) ("transport by airplane"), and 11 CFR 100.93(d) ("other means of transportation" includes "any other means of transportation" and specifically lists helicopters). The primary impact of these changes is that travel aboard a helicopter now would be reimbursed at the rate required in 11 CFR 100.93(c) (aircraft), rather than (d) (other conveyances), which was the case under the 2003 travel rules, as discussed below.

**1. 11 CFR 100.93(a)(1) and (2)—Scope of 11 CFR 100.93**

The rule at 11 CFR 100.93 is intended to establish reimbursement rates for "non-commercial travel" in the absence of a usual and normal charge. 11 CFR 100.93(a)(1). When a usual and normal charge is readily ascertainable, such as a specified fee by route, mileage, or date and time of use, the travel is generally considered "commercial travel" and the usual and normal charge must be paid to avoid receiving an in-kind contribution. See 11 CFR 100.93(a)(2) and 100.93(d)(1).

The Commission's 2003 travel rules distinguished between commercial and non-commercial air travel based on the certification status of the Federal Aviation Administration (FAA). Specifically, the Commission's 2003 travel rules applied to all airplanes not licensed by the FAA to operate for compensation or hire under 14 CFR parts 121, 125, or 135. See 11 CFR 100.93(a)(1) (2004).

HLOGA accomplishes the same result without explicit reference to specific FAA regulatory provisions in order to simplify and align the Commission's regulations with HLOGA, the Commission is replacing its reliance on specific FAA regulatory provisions with the new terms "commercial travel" and "non-commercial travel," which are defined in new 11 CFR 100.93(a)(3)(iv) and (v) and explained below. None of the commenters opposed this change.

**2. 11 CFR 100.93(a)(3)(i)—Definition of "Campaign Traveler"**

The Commission also is making a change to the definition of "campaign traveler" in 11 CFR 100.93(a)(3) to clarify that the term encompasses not only persons traveling on behalf of a candidate, but also candidates who

travel on behalf of their own campaigns. In the NPRM, the Commission proposed amending the definition of "campaign traveler" to include "[a]ny candidate for Federal office," as well as "any individual traveling in connection with an election for Federal office on behalf of a candidate or political committee" and "[a]ny member of the senior media traveling with a candidate." See proposed 11 CFR 100.93(a)(3)(i). The Commission received one comment in support of the proposed change, and no comments in opposition.

The Commission is adopting the proposed change along with one further revision to clarify that a candidate is a "campaign traveler" only when "traveling in connection with an election for Federal office." The term "campaign traveler" in revised 11 CFR 100.93 does not include Members of Congress when they engage in official travel, or candidates when they engage in personal travel or any other travel that is not in connection with an election for Federal office. Security personnel, including government-provided security personnel (such as the Secret Service), shall be treated as campaign travelers when traveling in connection with a Federal election on behalf of a candidate or a political committee. However, government-provided security personnel are not included when determining a "comparable aircraft of sufficient size to accommodate all campaign travelers" under 11 CFR 100.93(a)(3)(ii), as discussed below.

**3. 11 CFR 100.93(a)(3)(iv) and (v)—Definitions of "Commercial Travel" and "Non-Commercial Travel"**

The definition of "commercial travel" in new 11 CFR 100.93(a)(3)(iv)(A) corresponds to the new statutory language of HLOGA: Travel aboard an aircraft "operated by an air carrier or commercial operator certificated by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules." 2 U.S.C.

<sup>1</sup> Both "air carrier" and "commercial operator" are terms not defined in FAA regulations. See 14 CFR 1.1. An "air carrier" is "a person who undertakes directly by those under his control to engage in air transportation." A "commercial operator" is "a person who, for compensation or hire, engages in the carriage by aircraft in commerce of persons or property other than as an air carrier or foreign air carrier or under part 375." The Federal Aviation Administration's ("FAA") air carrier safety rules are contained in 14 CFR parts

439a(c)(1) and (2). The definition of "non-commercial travel" in 11 CFR 100.93(a)(3)(v) encompasses all air travel not included in the definition of "commercial travel." These definitions are unchanged from the NPRM.

One comment addressed these definitions, suggesting bias. The Commission did not receive any comments identifying a difference between the language of aircraft encompassed by the new term "non-commercial travel" and the aircraft included in former 11 CFR 100.93(c) ("an airplane not licensed by the Federal Aviation Administration to operate for compensation or hire under 14 CFR parts 121, 125, or 135").

The Commission is defining "commercial travel" with respect to conveyances other than aircraft as "other means of transportation operated for commercial passenger service." 11 CFR 100.93(a)(3)(iv)(B). This definition is unchanged from the proposed rule. The Commission did not receive any comments on this proposed definition.

The Commission also did not receive any comments on whether the definitions of "commercial travel" and "non-commercial travel" should specifically address the treatment of aircraft operated under complex multiple ownership or leasing arrangements, such as arrangements in which some of the owners of an aircraft are commercial operators certificated by the FAA but others are not. The Commission has decided not to address this issue in the final rule's definitions because the Commission expects that the structure of the final rule will eliminate any potential for confusion arising from complex ownership arrangements. The final rule focuses on the operator of the aircraft at the time of a given flight and whether that particular flight is subject to the applicable FAA safety standards, rather than the owners, service providers, or prior uses of the aircraft as in former 11 CFR 100.93. Multiple ownership arrangements for aircraft owned or leased by a candidate or a candidate's immediate family member through a multiple-ownership arrangement are addressed in 11 CFR 100.93(g), discussed below.

**4. 11 CFR 100.93(a)(3)(vi)—Definition of "Comparable Aircraft"**

HLOGA Section 801(a) requires reimbursement of fair market value for flights described within that section based on the charter rate for a "comparable plane of comparable size"

<sup>2</sup> 121 (large airplanes) and 135 (smaller airplanes and other aircraft).

10044283120

to the one actually flown. 2 U.S.C. 438a(c)(1)(B). The Commission interprets the term "comparable plane of comparable size" to mean an aircraft with similar physical dimensions to the aircraft actually flown and that is able to carry a similar number of passengers. The Commission recognizes, however, that there is an "analogous plane" for a helicopter and is, instead, construing the statute to require a comparison of similar types of aircraft (i.e., compare a helicopter to a helicopter). Accordingly, the Commission has defined the term "comparable aircraft" in new 11 CFR 100.93(d)(3)(vi) as "an aircraft of similar make and model as the aircraft that actually makes the trip, with similar amenities as that aircraft." See new 11 CFR 100.93(d)(3)(vi).

This interpretation is consistent with the Commission's interpretation of a similar term, "comparable commercial airplane," in its 2008 travel rules, as explained in the 2008 EAJ. See 2008 EAJ, 88 FR at 59959-59. The definition is also consistent with advisory opinions issued prior to the 2008 travel rules. For example, in Advisory Opinion 1984-48 (Hunt), when applying the then-operative term of a "comparable commercial conveyance" to an airplane, the Commission interpreted a "comparable" airplane as being of the same "type (e.g., jet aircraft versus prop plane) and service offered (e.g., plane with dining service as lavatory versus one without)" as the plane actually used. Therefore, if a candidate used a twin engine prop jet, a single engine prop aircraft would not be a comparable aircraft. The new term "comparable aircraft" is intended to require consideration of these distinctions as well as other differences, such as whether a plane is chartered with or without a crew, or with or without fuel.

**B. 11 CFR 100.93(b)—Reimbursement of Service Provider Required To Avoid the Receipt of a Contribution**

Paragraphs (b)(1) and (b)(2) of section 100.93 require a campaign traveler, or the political committee on whose behalf the travel occurred, to reimburse the provider of the aircraft or other conveyance at the applicable rate specified in 11 CFR 100.93(c), (d), (e), or (g) to avoid receipt of an in-kind or prohibited in-kind contribution.

As explained further below, travel on non-commercial aircraft by candidates for election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress ("House candidates"), or a person traveling on behalf of any such candidate or any authorized committee or leadership PAC of such candidate, is

generally prohibited (see 11 CFR 100.93(c)(2)) and cannot be accepted as an in-kind contribution or be reimbursed from campaign funds (see 11 CFR 113.5).

The Commission is also renumbering former paragraph (b)(1)(iii) as paragraph (b)(3) and revising it to permit members of the news media and government-provided security personnel traveling with a candidate to reimburse the political committee or to pay the service provider directly for their pro rata share of the travel. Ultimately it is the candidate committee's exclusive responsibility to ensure that the service provider is reimbursed for the value of the transportation provided to all persons traveling with the candidate; however, allowing members of the news media to reimburse the political committee or to pay the service provider directly is consistent with former 11 CFR 100.93 and takes into account the variety of billing practices that have been used by members of the media to pay for their travel. See 2008 EAJ, 88 FR at 59588; see also 11 CFR 9004.6 and 9034.6.<sup>9</sup>

Like members of the news media, a Federal or State government provider of security personnel traveling with a candidate, such as the Secret Service and National security staff, also may reimburse the political committee paying for the security personnel's portion of the travel expenses. See, e.g., Advisory Opinion 1992-81 (Clinton Gore) (news personnel permitted on the obligation of the Secret Service to provide reimbursement); see also 11 CFR 9004.6 and 9034.6. Under the revised rule, the government security provider therefore may pay the service provider directly or reimburse the political committee paying for the travel. In either case, members of the news media or the government provider of security must not pay more than their pro rata share of the travel costs as determined in accordance with 11 CFR 100.93(d), (e), or (g).

There is no indication that Congress was concerned about news media or government-provided security personnel paying for their own travel when traveling with Federal candidates or officeholders. Unlike when a corporation or political committee provides free or reduced travel services to a candidate, this reimbursement by news media or government-provided security personnel for their own travel does not implicate the goals of the Act in deterring corruption or the

appearance of corruption. Moreover, a candidate may have little or no control over whether to be accompanied by government-provided security personnel. Finally, although several commenters urged the Commission to prohibit political committees from paying any portion of the cost of a Federal candidate's flight, none of the commenters indicated that payments by the news media or government entities would pose the same dangers of corruption, or that the news media and government security providers should be prohibited from paying for their own travel, particularly when paying the same rate as others on the aircraft. Although the rule suggested in the NPRM would have prohibited any form of payment by the news media, the Commission sees no compelling reason to deviate from its longstanding policy of permitting the news media and government-provided security personnel to pay for their pro rata share of the fair market value of the travel.

**C. 11 CFR 100.93(c)(1)—Non-Commercial Air Travel by or on Behalf of Candidates for President, Vice-President, and U.S. Senate**

FELOGA requires candidates for President, Vice President, and the U.S. Senate to pay their "pro rata share of the fair market value" of non-commercial flights aboard aircraft. The pro rata share is "determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size by the number of candidates on the flight." 2 U.S.C. 438a(c)(1)(B) (emphasis added). Accordingly, new 11 CFR 100.93(c)(1) requires that the entire charter rate for a comparable aircraft of comparable size be divided among the candidate aboard the flight, or their representatives, as suggested in the NPRM.

All of the commenters who addressed this topic supported the requirement that presidential, vice-presidential, and Senate candidates pay the entire charter cost, rather than allowing other political committees or non-campaign travelers to pay for their own portion of the flight.

The final rule differs from the proposed rule only in that under the final rule the cost of the flight is split among candidates based on the number of campaign travelers flying on behalf of each candidate, rather than split evenly among the candidates as proposed in the NPRM. 72 FR at 59959. The new rule therefore provides a more accurate reflection of the proportion of the benefit derived from the flight by each candidate, while still requiring

<sup>9</sup> To the extent that any portion of 11 CFR 9004.6 or 9034.6 is inconsistent with 11 CFR 100.93, section 100.93 governs.

presidential, vice-presidential, and Senate candidates to pay the entire charter cost. For example, if Senate Candidate A is traveling with two campaign staffers, and Senate Candidate B is also traveling on the aircraft, and each candidate is traveling on behalf of his or her own campaign, then Candidate A would pay three-fifths of the charter fare and Candidate B would pay one-fifth.

This result is also consistent with the comment submitted by two of the sponsors of HLOGA, Senators Feingold and Obama, who suggested that the cost of the flight be split among committees in proportion to the benefit derived by each campaign. The Senators stated that this approach would be consistent with the payment for air travel required under the Senate Ethics Rules. See Standing Rules of the Senate, Rule XXV, Paragraph 1(c)(1)(C)(i).

Under new 11 CFR 100.93(c)(1), the "pro rata share" is calculated based on the number of candidates represented on a flight, regardless of whether the individual candidate is present on the flight. This provision is consistent with HLOGA, which limits expenditures for non-commercial air travel by presidential, vice-presidential, and Senate candidates, and their authorized committees. A candidate is represented on a flight if a person is traveling on behalf of that candidate or the candidate's authorized committee. See 11 CFR 100.93(c)(1). Thus, for example, if Senate Candidate A travels with the campaign manager of Senate Candidate B, but Candidate B does not travel, then the two Senate candidates must nonetheless each pay half of the charter rate. Candidate B's committee receives the same benefit from the travel by its staff as if Candidate B had taken the flight. This result is the same as proposed in the NPRM, which was suggested by all of the noncommercial air travel commenters.

Under new 11 CFR 100.93(c)(1), when a presidential, vice-presidential, or Senate candidate, or a representative of the candidate, is traveling on behalf of another political committee (such as a political party committee or Senate leadership PAC), rather than on behalf of the candidate's own authorized committee, the reimbursement for that travel is the responsibility of the political committee on whose behalf the travel occurs. If the political committee is other than an authorized committee or House candidate's leadership PAC, then the appropriate reimbursement rate for that political committee is set forth in new 11 CFR 100.93(c)(3), discussed below. In such cases, the presidential,

vice-presidential, or Senate candidate, or candidate's representative, is treated the same as any other person traveling on behalf of the political committee.<sup>7</sup>

The reimbursement rates for travel aboard government-operated aircraft or aircraft owned by a candidate or a member of a candidate's immediate family, are stated separately in paragraphs (a) and (b) of 11 CFR 100.93, as discussed below. See subsections II and I, below.

## 2. Alternatives Not Adopted

In the NPRM, the Commission sought comment on three alternative methodologies for calculating the appropriate reimbursement rate for travel by presidential, vice-presidential, or Senate candidates and their representatives.

First, the NPRM included several variations of a "per committee" alternative that would have required reimbursement based on the number of represented committees of any type, rather than the number of represented candidates or candidate committees. Second, a "per passenger" alternative would have required candidates to reimburse the service provider for only that portion of the normal and usual charter rate that reflected the number of candidate representatives as a percentage of all passengers on the aircraft. Third, a "comparable aircraft" alternative would have followed the approach in the Commission's 2003 travel rules by permitting reimbursement at the normal and usual charter rate or rental charge for an aircraft of sufficient size to carry all of the campaign travelers on the flight. See 11 CFR 100.93(c)(3) (2004) (requiring reimbursement of "the normal and usual charter fare or rental charge for a comparable commercial airplane of sufficient size to accommodate all campaign travelers").

The Commission has decided not to adopt any of the alternative methodologies proposed in the NPRM. The Commission believes that the methodology in the final rule described above is most consistent with the language of HLOGA. Moreover, the Commission believes that the proposed alternative methodologies might have

lent themselves to manipulation, with the result that corporations, political committees, and others could provide a benefit to the candidate or political committee on whose behalf the travel was undertaken by allowing the candidate or political committee to pay less than its pro rata share of the charter rate. Most of the commenters agreed that the proposed alternative methodologies were inconsistent with the intent of HLOGA.

One commenter proposed an alternative based on the "comparable aircraft" alternative proposed in the NPRM. This alternative would have followed the approach in the Commission's 2003 travel rules by permitting reimbursement at the normal and usual charter rate or rental charge for an aircraft of sufficient size to carry all of the campaign travelers on the flight. See 11 CFR 100.93(c)(3) (2004). The Commission is not adopting this commenter's version of the "comparable aircraft" alternative because it would allow for the potential reduction of costs by using smaller aircraft for campaign purposes rather than the aircraft actually flown. Moreover, the additional separate calculation of the fair market value of the flight actually taken would add unnecessary complexity to compliance with, and enforcement of, the rules.

## 3. Travel on Behalf of Leadership PACs of Senate, Presidential, and Vice-Presidential Candidates

HLOGA prohibits non-commercial air travel on behalf of leadership PACs of House candidates, but it does not prohibit such travel on behalf of leadership PACs of Senate, presidential, or vice-presidential candidates. Nor does HLOGA specify the rate at which the Senate, presidential, or vice-presidential candidate's leadership PACs must reimburse a service provider to avoid a contribution, as it does for those candidates and their authorized committees. For the reasons set forth below in section III.E.1, the Commission is applying the reimbursement rates in 11 CFR 100.93(c)(1)-(iii) to travel on behalf of the leadership PAC of any Senate, presidential, or vice-presidential candidate to make the new rules consistent with the Commission's past travel regulations. Those rules were set forth in the Commission's 2003 travel rules: first-class, coach, or charter rates, depending on whether the origin and destination cities are served by regularly scheduled commercial airline service.

<sup>7</sup> One commenter stated the Commission is to address a hypothetical scenario in which the chairman of a political party committee and a Senate candidate both travel aboard a non-commercial aircraft to a political party convention. In response to this request, the Commission notes that because the candidate would be traveling on behalf of the political party committee, that individual's status as a candidate would be irrelevant. Therefore, the political party committee would pay for the candidate's portion of the travel. See 11 CFR 100.93(c)(1).

**D. 11 CFR 100.93(c)(2)—Non-Commercial Air Travel by or on Behalf of Candidates for the House of Representatives**

New 2 U.S.C. 439a(c)(2) states that "in the case of a candidate for election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, an individual committee and a leadership PAC of the candidate may not make any expenditure" for non-commercial air travel, with exceptions for travel on government-operated airplanes and aircraft owned by the candidate or members of the candidate's immediate family. Such exceptions are discussed below. The effect of this provision is generally to prohibit travel by House candidates on non-commercial aircraft.

In the NPRM, the Commission proposed a general rule that would prohibit non-commercial air travel by House candidates and sought comment on whether House candidates should nonetheless be permitted to travel on non-commercial aircraft on behalf of their own campaign if the cost of the travel is provided by a permissible source, by treating the travel as a permissible in-kind contribution. One group of commenters addressed this question and urged the Commission to prohibit non-commercial air travel by House candidates as proposed in the NPRM and not allow such travel if it was provided by a permissible source as a permissible in-kind contribution.

The Commission agrees with the commenters, and is adopting the rule as proposed in the NPRM. See 11 CFR 100.93(c)(2). Outside of the exceptions for travel on government-operated and candidate-owned aircraft, there is no discussion in the legislative history of this provision in which Congress contemplated allowing non-commercial air travel by House candidates. Instead, statements by sponsors of the new law referred to a "ban" on House travel. See, e.g., 153 Cong. Rec. S10713 (daily ed. Aug. 2, 2007) (statement of HLOGA sponsors offered by Sen. Feinstein). In addition, the statute itself does not include any reimbursement rate for non-commercial travel by House candidates, whereas Congress did specify a rate for Senate and presidential candidates.

New 11 CFR 100.93(c)(2) prohibits House candidates, and individuals traveling on behalf of House candidates or leadership PACs, from engaging in non-commercial campaign travel on aircraft. This prohibition cannot be avoided by payments to the service provider, even

by payments from the personal funds of a House candidate.<sup>8</sup>

The prohibition does not apply, however, when the travel would be considered an expenditure by someone other than the House candidate, House candidate's authorized committee, or House candidate's leadership PAC. For example, travel by a House candidate on behalf of a Senate or presidential candidate, or a political party committee, would be permissible as long as the political party committee or candidate on whose behalf the travel occurs reimburses the service provider at the applicable rate under 11 CFR 100.93(c)(3) or (3).

**E. 11 CFR 100.93(c)(3)—Non-Commercial Air Travel by Campaign Travelers Not Traveling on Behalf of Federal Candidates and Their Representatives**

In the NPRM, the Commission proposed two alternatives with respect to non-commercial air travel by individuals traveling on behalf of political party committees and state political committees that support candidates' authorized committees or House candidate's leadership PACs. The first alternative would have applied the charter rate applicable to travel on behalf of Senate or presidential candidates unless one or more candidates or candidate representatives are also aboard the flight (in which case the candidates would already be paying the entire applicable charter rate to the service provider). The second alternative would have retained the rates in the 2003 travel rules, which permitted reimbursement at the first-class or coach rate by campaign travelers other than candidates. For the reasons explained below, the Commission is adopting the second alternative and requiring campaign travelers who are not traveling on behalf of candidates to continue to pay the rates in the 2003 travel rules. See 11 CFR 100.93(c)(3).

**1. Campaign Travelers Who Assist Traveling With or on Behalf of Candidates**

The Commission is not changing its current reimbursement requirements for campaign travelers who are traveling on behalf of political party committees, SSFs, non-affected committees, and

certain leadership PACs. Thus, 11 CFR 100.93(c)(3)(i)-(ii) preserves the three reimbursement rates for non-commercial air travel in previous 11 CFR 100.93(c)(1)-(3)—first class, coach, or charter—with the applicable rate depending on whether the travel is between two cities with regularly scheduled first-class or coach commercial airline service.

In 2003, the Commission extended its previous travel regulations to cover all travel in connection with a Federal election, stating, "[b]y establishing a single rate for travel reimbursement, the new rules will promote greater uniformity among all individuals traveling in connection with a Federal election on behalf of a political committee." 2003 EA, 68 FR at 68585. The Commission promulgated rules that applied to candidates and those traveling on behalf of candidates or their authorized committees, and extended those rules to other campaign travelers.

HLOGA, on the other hand, explicitly addresses the reimbursement rate only for campaign travelers who are candidates or are traveling on behalf of authorized committees. Section 439a(c)(1) applies by its own terms to a candidate (other than a House candidate) or any authorized committee of such a candidate. Section 439a(c)(2) applies by its own terms to House candidates, their authorized committees, and their leadership PACs.

Several commenters agreed that HLOGA's silence with respect to coverage of all political actors amounts to implicit approval of the Commission's 2003 travel rule, which permitted all campaign travelers, candidate and non-candidate alike, to pay the travel at either the first class, coach, or charter rate, depending on whether the origin and destination cities are served by regularly scheduled commercial airline service. One commenter argued that to expand the charter rate requirement beyond HLOGA's express language would be tantamount to assuming a legislative role in an area in which Members of Congress operate on a day-in-day-out basis. Two additional commenters noted that HLOGA's silence with respect to these other types of political committees constitutes a form of "legislative acquiescence" in the Commission's 2003 regulations. No commenters embraced the proposal included in the NPRM to extend the charter rate requirement to all Federal political committees.

The Commission disagrees with the argument that by enacting HLOGA, Congress set aside the required reimbursement rate for all campaign

<sup>8</sup> Although the general rule in 11 CFR 100.93(b)(2) states that no contribution results where a campaign traveler pays the necessary out-of-pocket expenditures in accordance with 11 CFR 100.93(c), there is no rate applicable to House candidates in 11 CFR 100.93(c). Thus, 11 CFR 100.93(b)(2) does not permit House candidates to travel on non-commercial aircraft by paying the service provider.

travelers. HLOGA's supporters spoke most explicitly to the provision's coverage in terms of its impact on Member and lawmaker travel.<sup>9</sup> Thus, together with HLOGA's Section 801, Congress clearly determined the "normal and usual charge" for non-commercial travel on aircraft used on behalf of candidates and their authorized committees without disturbing the Commission's approach that is currently in 11 CFR 100.93(c)(3). This provision requires non-candidate campaign travelers to pay the first class, coach, or charter rate, depending on whether the origin and destination cities are served by regularly scheduled commercial airline service. Each political organization or person within a campaign traveler is flying is responsible for paying the required reimbursement rate. For example, if three representatives of PAC F accompany a representative of Party Committee C, and the travel is to or from a city not served by regularly scheduled commercial airline service, the cost of the charter would be divided by the number of campaign travelers (four). PAC F would pay three-fourths of the charter cost while Party Committee C would pay one-fourth of the charter cost.

## 2. Candidates Traveling With Other Candidates Campaign Travelers

When a Senator candidate (either then a House candidate), or person traveling on behalf of a candidate or candidate's authorized committee, shares a non-

commercial flight with one or more campaign travelers who are not traveling on behalf of a candidate or candidate's committee, the candidate must pay the cost of the entire charter fare for a comparable aircraft of comparable size pursuant to 11 CFR 100.93(c)(1). Except as permitted under 11 CFR 100.93(c)(3), campaign travelers who are not traveling on behalf of a candidate, candidate's authorized committee, or House candidate leadership PAC, and other passengers cannot relieve the candidate's payment obligation.

For example, Senate Candidates A, Senate Candidate B, and Candidate C's campaign managers travel on a plane on behalf of their respective campaigns, along with PAC Representative P traveling on behalf of the PAC. The per rate share of the fair market value of the flight is determined by dividing the normal and usual charge rate for the plane by three because there are three individuals who are candidates or traveling on behalf of candidates (Candidates A, Candidate B, and Candidate C's campaign manager). Now 11 CFR 100.93(c)(1) bases the rate calculation on the proportional share of travelers attributable to each Senate candidate, so Candidate A pays one-third of the charter rate and Candidate B pays two-thirds.<sup>10</sup>

The PAC need not reimburse the service provider for PAC representative P's travel because the service provider will be compensated at the full charter rate for the flight by the two candidates. Moreover, no in-kind contribution from the service provider to the PAC will result because the payments by Candidates A and Candidate B will fully compensate the service provider for the value of PAC representative P's travel. The authorized committee of each candidate must report its payment to the service provider as an expenditure and need not report any portion of its payments to the service provider as an in-kind contribution to the PAC.<sup>11</sup>

<sup>10</sup> One commenter posed a hypothetical situation in which the chairman of a political party committee, who is then Senate candidate, takes non-commercial air travel to serve as the keynote speaker at a fundraiser to benefit a joint fundraising committee between the political party committee and his own campaign for the U.S. Senate. Because the joint fundraising committee is treated as an authorized committee of the Senate candidate, see 11 CFR 102.17(a)(1)(X), the Senate candidate's principal campaign committee (another authorized committee) must pay for the travel.

<sup>11</sup> One commenter posed a hypothetical scenario in which the chairman of a political party committee and a Senate candidate both travel aboard a non-commercial aircraft. Assuming that the Senate candidate is traveling on behalf of his own campaign, his authorized committee would be responsible for the full cost of the charter fare. See

## F. Additional Revisions to 11 CFR 100.93(c)

### 1. Presidential and Vice-Presidential Candidates

The Commission continues to treat travel by publicly financed presidential and vice-presidential candidates the same as travel by presidential and vice-presidential candidates who do not receive public funds. Therefore, 11 CFR 100.93(c)(1) applies to presidential and vice-presidential candidates who do not receive public funds, while 11 CFR 9004.7 and 9034.7, discussed below, continue to incorporate the 11 CFR 100.93 rates by reference for candidates who accept public funds. One important distinction, however, is that a presidential candidate accepting public funds for the general election is prohibited from receiving any in-kind contribution from any person, including an in-kind contribution of non-commercial air travel. The Commission did not receive any comments on this aspect of the rules.

### 2. Commercially Reasonable Time Frame

HLOGA requires candidates for President, Vice-President, and the U.S. Senate to pay their share with share of non-commercial travel on aircraft "within a commercially reasonable time frame" after the date on which the flight is taken.<sup>12</sup> 2 U.S.C. 485a(c)(1)(B). The Commission implements this requirement by specifying in 11 CFR 100.93(c) that the "commercially reasonable time frame" for payment is within seven days after the first day of the flight. This time frame applies to all payments required under new 11 CFR 100.93(c).

The seven-day time frame was established in the 2003 travel rules, and nothing in the record of this rulemaking suggests that a longer or shorter period is warranted. Nor has the Commission's experience in administering and enforcing the 2003 travel rules indicated any reason to adjust the time frame. The Commission received only one comment addressing this time frame, and that comment supported the seven-day time frame.

### G. 11 CFR 100.93(d)—Other Means of Transportation

For other means of transportation, such as limousines and all other automobiles, taxis, and buses, a

11 CFR 100.93(c)(3). The commenter suggested that such travel be recorded as an in-kind transfer from the Senate candidate to the political party committee, but the new rules at 11 CFR 100.93(c)(3) require the candidate or political party committee to record any such in-kind transfer.

<sup>9</sup> See, e.g., 113 Cong. Rec. S2425 (daily ed. Mar. 24, 2008) (statement of Sen. Obama) (speaking in terms of campaign spending a lot "to a lawmaker"); 112 Cong. Rec. S2425 (daily ed. Mar. 24, 2008) (statement of Sen. McCain) (discussing public perception that "Rights unfairly influence Members of Congress and serve as a way for lobbyists to curry favor with legislators"); 113 Cong. Rec. S186 (daily ed. Jan. 4, 2007) (statement of Sen. McCain) (speaking on "the ability of a Member to travel on a corporate jet"); 113 Cong. Rec. S249-49 (daily ed. Jan. 10, 2007) (statement of Sen. Reid) (denying his own solicitation and acceptance of private travel); 113 Cong. Rec. S1215 (daily ed. Jan. 25, 2008) (statement of Sen. Levin) ("The new rules will ensure that Members traveling on corporate jets would have to pay for them at the charter rate . . ."); 113 Cong. Rec. S2400 (daily ed. Jan. 25, 2007) (statement of Sen. Reid) ("It requires Senators to pay fair market value prices for charter flights, which put an end to the abuse of corporate travel."); 113 Cong. Rec. S10094 (daily ed. Aug. 2, 2007) (statement of Sen. Feingold) (referring to "a requirement that Senators pay the full charter rate on airplanes for the personal, official or campaign purposes . . ."); 113 Cong. Rec. S10705 (daily ed. Aug. 2, 2007) (statement of Sen. Levin) ("The new rules will ensure that Members traveling on corporate jets would have to pay for them at the charter rate . . ."); and 113 Cong. Rec. S10715 (daily ed. Aug. 2, 2007) (statement of Sen. Reid) (the law "requires Senators to pay fair market prices for charter flights, putting an end to abuse of corporate travel").



political committee must pay the service provider an amount equal to the normal and usual fare or rental charge for a comparable commercial conveyance of sufficient size to accommodate all campaign travelers, including members of the news media traveling with a candidate, and security personnel, if applicable, in 11 CFR 100.93(d). This provision is substantially identical to the 2003 travel rule and to the rule proposed in the NPRM. NPRM, 72 FR at 59965. HLOGA does not address travel on any conveyances other than aircraft, and the Commission's experience administering the 2003 rule for travel on conveyances other than aircraft does not indicate that a change in the rule regarding travel on conveyances other than aircraft is warranted.

The Commission did not receive any comments on proposed 11 CFR 100.93(d).

#### H. 11 CFR 100.93(e)—Government Conveyances

The Commission's 2003 travel rules at 11 CFR 100.93(e) required reimbursement for travel aboard airplanes provided by the Federal government, or by any State or local government entity, at the same rate as travel aboard other airplanes. Non-commercial campaign travel aboard government conveyances other than aircraft was reimbursed under former 11 CFR 100.93(e)(2) at the same rate as travel aboard the equivalent means of transportation not provided by a government entity. HLOGA generally prohibits House candidates from using campaign funds for non-commercial travel, except for travel aboard an aircraft "operated by an entity of the Federal government or the government of any State."<sup>12</sup> 2 U.S.C. 436a(c)(2)(B).

As noted above, under the Commission's 2003 rules the required reimbursement rate for travel on government airplanes was the first-class, coach, or charter rate, depending on whether the travel occurred between cities served by regularly scheduled commercial airline service, and whether that service was available at a first-class or coach rate. For travel to or from a

military airbase or other location not accessible to the general public, reimbursement was required based on the lowest unrestricted and non-discounted first-class airfare to or from the city with regularly scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used. Section 661 of HLOGA then provides an exception to the prohibition on House candidates and their authorized committees and leadership PACs from making expenditures for travel on non-commercial aircraft, but does not specify any particular rate of reimbursement for travel aboard government-operated aircraft.

The NPRM proposed a set of two different rates in 11 CFR 100.93(e)(1) that candidates could choose from for reimbursement for government-operated aircraft. The first rate, proposed in 11 CFR 100.93(e)(1)(i), requires reimbursement of the appropriate government entity at the pro rata share per represented candidate of the normal and usual charter fare or rental charge for the flight on a comparable aircraft of sufficient size to accommodate all of the campaign travelers (the "per candidate campaign traveler" reimbursement rate). The second rate, proposed in 11 CFR 100.93(e)(1)(ii), requires reimbursement at the private traveler reimbursement rate per campaign traveler, as specified by the government entity operating the aircraft (the "private traveler" reimbursement rate). The NPRM did not propose any substantive changes to 11 CFR 100.93(e)(2), which governs travel on government conveyances other than aircraft.

The Commission did not receive any comments on proposed 11 CFR 100.93(e).

Except as discussed below, new 11 CFR 100.93(e) is the same as proposed in the NPRM. Accordingly, a candidate campaign traveler, or the authorized committee or House leadership PAC on whose behalf the travel is conducted, must reimburse a government entity for travel on any government-operated aircraft at either of the two rates set out in new 11 CFR 100.93(e)(1)(i) and (ii).

#### 1. 11 CFR 100.93(e)(1)(i)—"Per Candidate Campaign Traveler" Reimbursement Rate

Under the revised rules, the applicable charter rate is for a comparable aircraft of sufficient size to accommodate all of the campaign travelers. Unlike 11 CFR 100.93(e)(1), which requires the charter rate to be based on a comparable aircraft of comparable size, the comparable aircraft used for the basis of the charter rate in

11 CFR 100.93(e)(1)(i) need not be the same size as the government-operated aircraft actually used. Similarly, the comparable government aircraft need not be capable of accommodating the non-campaign passengers and equipment aboard the government-operated aircraft.

Members of the media traveling with a candidate, and security personnel not provided by a government entity, must be included in the number of campaign travelers for the purposes of identifying a comparable aircraft of sufficient size to accommodate all of the campaign travelers. A comparable aircraft, however, need not be able to accommodate government-required personnel (e.g., Secret Service or National Security Agency officers provided to protect the candidate) or government-required equipment (e.g., bulky security or communications devices provided for the national security or communications needs of the candidate).<sup>13</sup> For example, a significant portion of Air Force One may be occupied by personnel and equipment mandated by national security requirements and other news personnel with the office of the President, not the campaign.

Government-required security personnel are not included in the number of campaign travelers for the purposes of identifying a comparable aircraft. The purpose for this exclusion is to avoid penalizing candidates who are required to travel with government security personnel by obliging them to pay the charter rate for a larger aircraft than would otherwise be needed to transport such candidates and their campaign travelers. All security personnel, including government-provided security personnel, are included, however, in determining the number of campaign travelers for purposes of estimating such candidates' pro rata share. This is consistent with the parallel provisions concerning travel on private aircraft (11 CFR 100.93(c)(1)), and with the provision concerning travel on government-operated aircraft that is reimbursed at the "private traveler" reimbursement rate (11 CFR 100.93(e)(1)(ii); see discussion below). A candidate's authorized committee must thus reimburse the service provider for the same number of campaign travelers regardless of whether the travel occurs

<sup>12</sup> HLOGA generally prohibits the receipt of funds for the non-commercial travel to require donors to pay the pro rata share of the full market value of a flight for non-commercial travel, except for travel aboard "an aircraft owned (leased by a governmental entity." See Public Law 110-41, sec. 646(a)(1), amending Paragraph 1(c)(1) of rule XXXV of the Standing Rules of the House. In order to avoid a regulatory gap with respect to travel on aircraft operated by local governments, new 11 CFR 100.93(e) applies to campaign travel on aircraft operated by local government entities in addition to Federal and State government, as proposed in the NPRM. The Commission did not receive any comments on this provision.

<sup>13</sup> The term "government-required personnel" encompasses individuals assigned to accompany a campaign traveler for reasons of national security or other official purposes required by law or government policy. It does not encompass a Federal official's staff or other individuals who are "required" by the administration solely by virtue of their staff positions.



on a private or government-operated aircraft, and regardless of whether the candidate is reimbursing at the "per candidate campaign traveler" reimbursement rate or at the "private traveler" reimbursement rate. The general rule regarding reimbursement to a candidate submitted by members of the news media and government-provided security personnel (11 CFR 100.93(b)(3)) applies to both private and government-operated aircraft.

For example, if eleven passengers (Presidential Candidate A and two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B traveling on behalf of her own campaign, PAC representative P, four members of the news media traveling with Presidential Candidate A, and two members of the Secret Service required to travel with Candidate A), travel on a twelve-seat government aircraft, reimbursement would be required at the normal and usual charter rate for a comparable aircraft of sufficient size to accommodate nine passengers. This size Secret Service agents need not be counted when determining the size of a comparable aircraft because they would be "government-required personnel." Given that no portion of the normal and usual charter fare or rental charge may be attributed to any non-candidate campaign traveler or any other passenger, the charter fee would be divided by ten (the number of candidates, their campaign staffers, members of the media, and security personnel traveling with the candidates). PAC representative P would not be required to reimburse the government entity for his or her travel and is not permitted to assume any of the payment otherwise required from the candidates.

Thus, Presidential Candidate A would pay nine-tenths of the full charter rate for the comparable nine-seat aircraft, and Senate Candidate B would pay one-tenth of the charter cost. The four media representatives or their employers may reimburse Presidential Candidate A for up to four-tenths of the cost of the nine-seat charter aircraft, or pay the government that amount directly, pursuant to 11 CFR 100.93(b)(3).<sup>14</sup> Likewise, the Secret Service may reimburse Candidate A up to two-tenths of the cost for the two Secret Service representatives, or it may pay that

amount directly to the government entity providing the aircraft.

#### 11 CFR 100.93(d)(1)(ii)—"Private Traveler" Reimbursement Rate

The second rate of reimbursement, the "private traveler" reimbursement rate, requires payment of the rate specified by the Federal, State, or local government agency or other government entity operating the aircraft. If the government entity has established a schedule of rates based on the type of traveler, and the schedule includes a rate for private travel on its aircraft by members of the public, then the campaign traveler choosing this option must reimburse the government at that rate.<sup>15</sup>

For example, if the same eleven travelers (Presidential Candidate A and two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B traveling on behalf of her own campaign, PAC representative P, four members of the media traveling with Presidential Candidate A, and two Secret Service agents required to travel with Presidential Candidate A) travel aboard an aircraft operated by a State government, either candidate could choose to pay the "private traveler" reimbursement rate if such a rate is specified by that State government instead of the charter rate for a comparable aircraft of sufficient size to accommodate the campaign travelers. If the State government normally charges \$100 per person per hour for use of its aircraft for State or Federal agencies and \$200 per passenger hour for private travel by authorized State employees and members of the public, then each candidate choosing this rate would pay for the campaign travelers traveling on behalf of that candidate at the \$200 per person per hour rate. Presidential Candidate A is responsible for the cost of the travel of the two Secret Service agents under 11 CFR 100.93(d)(1)(ii).<sup>16</sup> Presidential Candidate A's payment for nine campaign travelers is a total of \$1,800 per hour, although the four media representatives could reimburse Presidential Candidate A up to a total of \$800 per hour to cover the cost of their

travel and the two Secret Service agents could reimburse Presidential Candidate A up to a total of \$400 per hour for their travel. Candidate B's cost is \$300 per hour to cover the candidate's own travel. PAC representative P must pay for his or her own travel at \$200 per hour.<sup>17</sup>

If, however, the government entity's private traveler reimbursement rate is based on an hourly rate for the entire aircraft, then the candidate choosing this rate would calculate the amount that he or she must reimburse by determining what his or her share of the entire hourly rate split between the two candidates and the PAC is, in proportion to the number of campaign travelers traveling on behalf of each political committee, including the media representatives traveling with a candidate, and security personnel. There are a total of eleven campaign travelers on the flight (Presidential Candidate A, two campaign staffers traveling on behalf of Presidential Candidate A, Senate Candidate B, four members of the media traveling with Presidential Candidate A, two Secret Service agents required to travel with Presidential Candidate A, and PAC Representative P), so Presidential Candidate A must pay nine-elevenths of the hourly rate, for which the media could reimburse the candidate up to four-elevenths of the charter rate and the Secret Service could reimburse the candidate up to five-elevenths of the charter rate; Candidate B must pay one-eleventh; and PAC Representative P must pay one-eleventh.

The Commission did not receive any comments on this aspect of the proposed rule. The rule is unchanged from that proposed in the NPRM. See 11 CFR 100.93(d)(1)(ii).

#### 8. Travel on Air Force One or Two

The Commission sought, but did not receive, comments on whether it should promulgate final rules specifically to address travel on Air Force One and Two.<sup>18</sup> The Commission is not promulgating a separate rule for travel on these aircraft because the application of either of the rules in 11 CFR

<sup>14</sup> Pursuant to 11 CFR 100.93(b)(3)(A) any individual traveling in connection with an election for Federal office on behalf of a political committee is a "campaign traveler."

<sup>15</sup> Air Force One designation is assigned to any airplane that is providing transportation to the President of the United States. Air Force Two is the designation assigned to any airplane that is providing transportation to the Vice President of the United States. Marine One is the designation used for any Marine helicopter that is providing transportation to the President. Because "aircraft" includes airplanes and helicopters, this discussion is equally applicable to Marine One.

<sup>14</sup> The Commission is aware that the White House Travel Office has agreements with the White House Campaigns Association regarding travel arrangements for members of the media, and these rules are not intended to alter those agreements.

<sup>15</sup> The Department of Justice, for example, publishes a list of hourly reimbursement rates for both fixed-wing aircraft and helicopters and includes an "All Other User" rate, which is the private traveler rate. See *Justice Department 2010 Reimbursement Rates*, available at [http://www.dhs.gov/asset/justice/reimbursement/2010/2010\\_fair\\_and\\_helicopter\\_rates.pdf](http://www.dhs.gov/asset/justice/reimbursement/2010/2010_fair_and_helicopter_rates.pdf).

<sup>16</sup> Because Candidate A is responsible for the cost of the Secret Service travelers, the Secret Service may reimburse Candidate A for the cost of their travel under 11 CFR 100.93(b).

100.93(e)(1) is sufficient to address travel on Air Force One and Two. Specifically, reimbursement for travel on Air Force One or Two using the "per candidate campaign traveler" rate (11 CFR 100.93(e)(1)(i)) already provides that the starter rate be based on an amount of "sufficient rate to compensate campaign travelers," excluding all government-required personnel and equipment. Travel aboard Air Force One or Two therefore would simply be a specific application of the more general rule applicable for travel on all government-operated aircraft.

#### 4. Non-Candidate Campaign Travelers

The Commission has not, but did not receive, comments on the extent to which campaign travelers fly on government-operated aircraft when not traveling with, or on behalf of, a candidate or candidate's committee. For example, a representative of a political party committee might travel in connection with a Federal election on a government-owned aircraft on which a Federal candidate is not also present. In the absence of a record indicating that this travel is frequent enough to justify a separate provision in the rule, or that a special rule is needed, the final rules do not treat this potentially hypothetical situation differently from other travel by non-candidate campaign travelers on non-commercial aircraft. Thus, new 11 CFR 100.93(a)(2) is the same as the 2003 rule for travel on a government aircraft. That is, if the non-candidate campaign traveler travels to a military base or other location not accessible to the general public, the travel must be reimbursed at the lowest unrestricted and non-discounted first-class airfare to or from the city with regularly-scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used. Otherwise, the campaign traveler must reimburse the government in accordance with 11 CFR 100.93(a)(9).

#### 5. Time Period for Reimbursement of Travel on Government Conveyances

New 11 CFR 100.93(e) provides that payment must be made within the time period specified by the government entity providing the aircraft or other conveyance. This policy defers to a government entity's management of its own aircraft and avoids potential conflicts with that entity's own regulations. The NPRM did not propose a specific time period for reimbursement for travel on government-operated aircraft and, of the alternative rules, the Commission did not receive any

comments on an appropriate period. The government entity's accountability for the use of its aircraft serves as a check on potential abuses in payment delays by campaign travelers.

#### 1. Proposed 11 CFR 100.93(g)— Exception for Aircraft Owned by Federal Candidates and Their Immediate Family Members

HLOGA's amendments to 5 U.S.C. 439a contain an exception from the payment and reimbursement requirements for travel aboard aircraft that are "owned or leased" by a candidate or a candidate's immediate family member (hereinafter "candidate-owned"), including an aircraft owned or leased in any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that (1) the entity is not a "public corporation" and (2) the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 6302(c)(3)(A). In the NPRM the Commission proposed a rule, new 11 CFR 100.93(g), in which the exception would apply to all of the restrictions on expenditures for air travel in new 2 U.S.C. 439a(c). See discussion of new 11 CFR 113.5, below. The Commission requested comments on this proposed exception, new 11 CFR 100.93(g), but received none.

While the exception relieves the restriction on expenditures, it still requires a candidate to reimburse the service providers (candidates, members of their immediate family, or entities in which either owns an interest) if the candidate seeks to avoid receiving an in-kind contribution from the service provider for the candidate's use of the aircraft. New 11 CFR 100.93. New section 100.93(g) sets out the appropriate reimbursement rate even though candidates for Federal office may make unlimited contributions to their own campaigns, since contributions must be reported by their authorized committees.<sup>10</sup> 11 CFR 110.10; Advisory Opinions 1981-08 (Hoagland), 1980-09 (Faulstich), 1985-33 (Cottins), and 1984-80 (Mulloy). Contributions by all other persons, including immediate family members, are subject to the applicable amount limits and source prohibitions. 11 CFR 110.1 et seq.

The NPRM proposed three alternative reimbursement rates as follows:

<sup>10</sup> There is one exception to this general rule: a \$50,000 limit on public-financed presidential candidate (and primary and the general election. See 11 CFR 100.93(c), 100.93(d)(1), and 100.93(e)(1).

The first alternative would have required reimbursement for aircraft owned by candidates and their immediate family members at the rates set forth in the Commission's 2003 travel rules: first-class, coach, or charter rates, depending on whether the origin and destination at times seemed to regularly scheduled commercial airline service.

The second alternative would have required reimbursement for the "incremental cost" of operating the aircraft, meaning the actual cost of fuel and any incremental costs such as landing fees but excluding depreciation.

The third alternative would have been based on the "actual cost" of operating the aircraft, such as the hourly, mileage, or other applicable rate charged the candidate, corporation, or immediate family member for the costs of the travel. For example, if a candidate traveled on an aircraft leased by an immediate family member at a cost of \$1,000 per hour, the appropriate reimbursement rate to that family member would have been \$1,000 per hour.

New 11 CFR 100.93(g) narrows several aspects of these alternatives. The Commission is also re-organizing the rule in recognition that an increasing number of aircraft are operated through shared-ownership arrangements, while other aircraft may be owned solely by the candidate or the candidate's immediate family members. In addition, the new rule will eliminate the statutory limitation in 2 U.S.C. 439a(c)(3)(A) that in situations where the aircraft is owned through a shared-ownership arrangement, the candidate's use of the aircraft must not exceed the proportional ownership interest attributable to the candidate or the candidate's immediate family member.

The new rule provides three alternative rates to address these different scenarios: (1) A shared-ownership arrangement where the candidate uses the aircraft within the limits of the relevant ownership interest; (2) a shared-ownership arrangement where the candidate uses the aircraft in excess of the limits of the relevant ownership interest; or (3) the aircraft is wholly owned by a candidate or a candidate's immediate family member.

Because the exception in 2 U.S.C. 439a(c)(3) for travel on aircraft owned by candidates or members of their immediate family permits otherwise restricted or prohibited expenditures by candidates and their committees, the exception is limited only to travel by candidates or persons traveling on behalf of candidates, their authorized

10044283127

committees, and House candidate leadership PACs. Similarly, the exception applies only to travel by a candidate on an aircraft owned or leased by that candidate or that candidate's immediate family member. The exception does not extend, however, to travel by other candidates who are traveling on behalf of their own campaign, or the individuals traveling on behalf of other political committees. These latter campaign travelers must reimburse the candidate or other owner of the aircraft according to the rates set forth in 11 CFR 100.93(c).

For example, if Senate Candidate A is traveling on behalf of his or her own campaign and Candidate B on behalf of his or her own campaign on an aircraft owned by Candidate B, then Candidate A must pay half of the cost of the normal and usual charter rate for a comparable aircraft of comparable size. Candidate B must pay for (or treat as a personal contribution) the candidate's own portion of the flight pursuant to the applicable rate in 11 CFR 100.93(g). If Party Committee Official C travels with Candidate B on behalf of the party committee on an aircraft owned by Candidate B, the party committee must pay the rate determined in accordance with 11 CFR 100.93(d)(3). The 11 CFR 100.93(c)(3) payment exception for travel with a candidate would not apply to travel on a candidate-owned aircraft because the candidate is not paying a charter rate for the entire aircraft in accordance with 11 CFR 100.93(d)(4).

#### 1. 11 CFR 100.93(g)(1)(i)—Use Within the Limits of a Shared-Ownership Arrangement

The exception in 11 CFR 100.93(g) applies to an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," so long as that entity is not a corporation with publicly traded shares. The rules in 11 CFR 100.93(g) therefore apply to a wide variety of shared-ownership arrangements, including time-sharing arrangements and certain lease arrangements, and regardless of whether the ownership is made available to the candidate through a commercial operator certified by the FAA.

When a candidate or a candidate's immediate family member owns or leases an aircraft through any form of shared-ownership or lease agreement, 11 CFR 100.93(g)(1)(i) requires the candidate's committee to reimburse the candidate, candidate's immediate family member, or the administrator of the aircraft (e.g., NetJets)—or treat as a personal contribution from the candidate, where the candidate is the

owner or lessee—for the hourly, mileage, or other applicable rate charged to the candidate, immediate family member, or corporation or other entity through which the aircraft is ultimately available to the candidate, for the costs of the travel. This reimbursement rate applies only to the extent that the candidate's use of the aircraft does not exceed the proportional share of the ownership interest in the aircraft held by the candidate or candidate's immediate family member, as defined in 11 CFR 100.93(g)(2). Because a candidate would receive an in-kind contribution to the extent that the candidate is provided with something of value at less than the normal and usual cost, the ownership or lease agreement cannot provide a disproportionate benefit to the candidate. Thus, the amount of use to which the candidate or the candidate's immediate family member is entitled under an ownership or lease agreement must be similar to the amount of use to which other similarly situated owners are entitled. For example, if a candidate is one of four owners who each own 25 percent of an aircraft in a shared-ownership arrangement, the ownership agreement cannot allow the candidate to use the aircraft free of charge or at a reduced rate forty percent of the time while each other owner has access to the aircraft for only twenty percent of the time.

#### 2. 11 CFR 100.93(g)(1)(ii)—Use in Excess of the Limits of a Shared Ownership Arrangement

In some shared-ownership agreements, an ownership interest entitles each "owner" to a specified amount of use of one or more aircraft. In this case, if a candidate's flight exceeds his or her proportional ownership interest in the aircraft, or that of the candidate's immediate family member, that flight falls outside of 11 CFR 100.93(g)(1)(i). See now 11 CFR 100.93(g)(1)(ii). Only a flight that exceeds the use permitted under the ownership agreement, however, would be excluded from the exception in 11 CFR 100.93(g). For example, if a candidate's spouse owns an interest in an aircraft through a time-share arrangement that entitles the spouse to ten hours of flight time per month, and the candidate uses the aircraft for three separate five-hour flights in a single month, the rate provided in 11 CFR 100.93(g)(1)(i) applies to the first 10 hours but does not apply to the last five hour flight. For the purposes of this example, the spouse's ten hours of flight time per month must not have been otherwise used by the spouse or another person. If the spouse or another person

does make use of the aircraft for any part of the ten allotted hours, the candidate's use of the aircraft would be combined with the other uses for purposes of calculating the ten hour limit. For the last five hour flight, a Senate, presidential, or vice-presidential candidate must provide reimbursement at the rate established by 11 CFR 100.93(c)(1), in accordance with 11 CFR 100.93(g)(1)(ii). Reimbursement by a House candidate, on the other hand, would be subject to the general prohibition on non-commercial air travel by House candidates. See 11 CFR 100.93(c)(2).

#### 3. 11 CFR 100.93(g)(1)(iii)—Wholly Owned Aircraft

When the entire aircraft is owned by a candidate as an individual, or by the candidate's immediate family members as individuals, the candidate's authorized committee need reimburse (or report as an in-kind contribution, to the extent permissible) only the *pro rata* share per campaign traveler of the costs associated with the trip.<sup>20</sup> 11 CFR 100.93(g)(1)(iii). These associated costs include, but are not limited to, the cost of fuel and crew, and a proportionate share of annual and recurring maintenance costs. *Id.* For example, because aircraft must periodically undergo regularly scheduled maintenance in order to comply with applicable safety laws, the candidate's committee must pay its proportionate share of these regular costs. The candidate's committee need not pay, however, for general depreciation in the value of the aircraft. Similarly, reimbursement for piloting and crew expense is not required when the candidate or candidate's immediate family member pilots the aircraft and serves as the crew. On the other hand, if a pilot or crew is employed for the flight, the cost of that service must be included in the reimbursement rate.

#### 4. 11 CFR 100.93(g)(2) and (3)—Ownership Interest and Proportional Share of an Ownership Interest

HLOGA does not define the term "ownership interest." The Commission interprets the term "ownership interest" to include fractional ownership, voting or equity interest, or use arrangements.

<sup>20</sup> As discussed above, with the exception of publicly funded presidential candidates, candidates are permitted to make unlimited contributions to their own campaign. Contributions by all other persons, including immediate family members, are subject to the applicable amount limits and source prohibitions. An aircraft owned entirely by a household corporation would be treated as an aircraft accessed through a multiple ownership arrangement under 11 CFR 100.93(g)(1)(i) or (ii), rather than (iii).

as well as "time-sharing" arrangements in which the candidate or an immediate family member pays a fee for a specified amount of travel on the aircraft.

Similarly, HLOGA does not define the term "public corporation." The Commission interprets the term "public corporation" as applying to any corporation with publicly traded shares. See 11 CFR 100.93(g)(2). Because HLOGA explicitly extends the exception contained in 2 U.S.C. 438(c)(3)(A) to "aircraft owned by an entity that is not a public corporation," aircraft owned by privately held corporations without publicly traded shares, partnerships without publicly traded equity interests, limited liability companies without publicly traded shares, and all minor entities without publicly traded shares or equity interests would fall within 11 CFR 100.93(g), so long as a candidate or a member of the candidate's immediate family owns an equity interest or voting interest in that entity.

The HLOGA exception applies so long as a candidate's use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 438(c)(3)(A). However, the statute does not specify the exact nature of the relationship between ownership shares and use of the aircraft.

New 11 CFR 100.93(g)(3) defines a "proportional share of the ownership interest" as "the amount of use to which a candidate or immediate family member is entitled under an ownership or lease agreement." Unlike the account for all of the potential ownership structures of an entity that may own or lease an aircraft, new 11 CFR 100.93(g)(3) establishes one general condition for the exception to apply: Unless the aircraft is owned entirely by the candidate or the candidate's immediate family members, the amount of use of the aircraft to which such ownership share is entitled must be specified in writing prior to the candidate's use of the airplane. The Commission does not intend to delve into the various ownership structures, so long as the ownership or lease agreement does not provide a benefit to the candidate that is disproportionately greater than the benefit provided to others with similar ownership interests in the aircraft.

In order to ensure that the candidate's use of the aircraft remains within the parameters of use specified in the agreement, the candidate's committee must, prior to each flight, obtain certification from the individual or entity owning the aircraft available that the candidate's planned use, in combination with the other uses of the

aircraft by the person or persons with the ownership interest in the aircraft, will not exceed the amount of use permitted under the ownership or lease agreement. If any part of a flight does exceed the use permitted under the ownership interest, then payment for the entire flight must be made under 11 CFR 100.93(c), not 11 CFR 100.93(g). For example, if a candidate plans a five-hour flight and the candidate's spouse is entitled to use an aircraft for ten hours per month through the spouse's position with a partnership that participates in a time-share agreement, the candidate must not make use of the aircraft until it obtains certification from the spouse, the partnership, or time-share provider that the candidate's planned five-hour flight will not cause the spouse to exceed the spouse's ten-hour limit. If the spouse has already used the aircraft for six hours that month, the candidate's planned use would cause the spouse to exceed the ten-hour limit and the entire five-hour flight would fall under 11 CFR 100.93(c), not 11 CFR 100.93(g). See 11 CFR 100.93(g)(1)(ii).

Some ownership agreements, however, may include specific fees for any use of an aircraft above or beyond the normal amount of permitted use under the agreement. For example, an ownership agreement might provide that one annual ownership share entitles that owner to use an aircraft for twenty hours per month without additional charges, and up to ten additional one hundred hours per month at an additional fee of \$1,000 per hour. In such cases, the hourly fee for the additional hundred hours would be included within the "proportional share" of that ownership interest. A candidate with such an ownership interest could therefore use the aircraft for up to one hundred and twenty hours in a month and reimburse the entity operating the aircraft at the rate in 11 CFR 100.93(g)(1)(i). The candidate would be required to pay the operator for one-twelfth of the ownership share (the cost of one month of the annual ownership share) to cover the first twenty hours, plus \$1,000 for each of the additional hundred hours (\$100,000).

##### 5. Specific Time Period for Repayment

The NPRM inquired whether the Commission should require the candidate's committee to make the payment required by 11 CFR 100.93(g) within a specific time period, such as no later than seven days from the first day of travel, which would be consistent with payment for travel on other aircraft under 11 CFR 100.93(d). The Commission did not receive any

comments on this issue. The Commission is not specifying a time period for repayment in the rule itself in expectation that, in shared-ownership or lease arrangements, the candidate will make the repayment in accordance with the normal business practices of the entity administering the shared-ownership or lease agreements. If not, that entity will be deemed to have made a loan to the candidate's committee that would, if not repaid within the required commercially reasonable period, become an in-kind contribution to the candidate's authorized committee, subject to the limits, prohibitions, and reporting requirements of the Act.

##### J. 11 CFR 100.93(i)—Reporting Requirements

The Commission is relocating the reporting requirements of 11 CFR 100.93 from paragraph (h) to paragraph (i), as proposed in the NPRM, but is not making any substantive revisions to those requirements. The Commission did not receive any comments on the reporting requirements.

##### K. 11 CFR 100.93(j)—Recordkeeping Requirements

Consistent with the changes to the reimbursement rates required for candidates, authorized committees of candidates, and leadership PACs of House candidates, the Commission is updating the recordkeeping requirements for non-commercial travel at 11 CFR 100.93(j), which are being relocated to new 11 CFR 100.93(j).

First, the revised recordkeeping requirements maintain the basic elements of the Commission's 2003 travel rules. Depending on the eligible reimbursement rate, see new 11 CFR 100.93(c), (e), and (g), political committees are required to maintain the appropriate records for non-commercial travel under this section. What records are necessary depends on whether a campaign traveler may pay first-class or a coach rate for a flight, or is required to reimburse at the charter rate or one of the rates applicable for use of government conveyances.

Second, the Commission is requiring candidate committees to obtain and keep copies of any shared-ownership or lease agreements, as well as the pre-flight certifications of compliance with those agreements, that the candidate's committee must obtain to comply with the requirements of 11 CFR 100.93(g)(1)(i) and (g)(3). These records are necessary to determine whether a candidate's use of the aircraft would cause the person with the ownership interest in the aircraft (the candidate or the candidate's immediate family

member) to exceed the amount of use of the aircraft included in that ownership interest.

The Commission also sought comment on the appropriate duration of this record retention requirement, but did not receive any comments. Thus, the general record retention period of three years applies in these documents. See 61 CFR 101.14(b)(3). All other applicable recordkeeping requirements remain in effect with respect to these documents. See, e.g., 11 CFR 101.14(b).

#### IV. Restrictions on Use of Campaign Funds for Flights on Noncommercial Aircraft (2 U.S.C. 439a(c))—11 CFR 113.5

In addition to amending the travel reimbursement regulations at 11 CFR 100.93, the Commission is adding new 11 CFR 113.5 to implement the limit on expenditures for non-commercial air travel established by HLOGA. The Commission is promulgating new 11 CFR 113.5 to provide guidance regarding the making of expenditures, which is parallel to the guidance provided in 11 CFR 100.93 regarding contributions. The final rule is identical to proposed 11 CFR 113.5. In the NPRM, the Commission requested comments as to whether a new rule (11 CFR 113.5) is necessary to implement new 2 U.S.C. 439a(c) in light of the proposed revisions to 11 CFR 100.93, but did not receive any comments addressing the question.

##### A. New 11 CFR 113.5(a)—Presidential, Vice-Presidential and Senate Candidates

New 11 CFR 113.5(a)(1) implements the general prohibition in new 2 U.S.C. 439a(c) on the expenditure of funds by candidates for President, Vice-President or the Senate and their authorized committees for aircraft flights, with the two exceptions provided in HLOGA (in addition to the specific permissions for travel on government-owned aircraft and candidate-owned aircraft). The first exception is for air travel on "commercial" flights. See 11 CFR 113.5(a)(1). The second exception is for air travel on "non-commercial" flights if either the candidate, the authorized committee, or another political committee, reimburses the provider of the aircraft for the candidate's pro rata share per candidate campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size within seven days of when the flight began. See 11 CFR 113.5(a)(2). New 11 CFR 113.5(a)(1) and (2) provide cross references to definitions of the terms "commercial travel" and "non-commercial travel" in

11 CFR 100.93(a)(3)(iv) and (v). The "candidate's pro rata share per candidate campaign traveler of the normal and usual charter fare" is calculated in the same manner as in 11 CFR 100.93(c)(1). A candidate's committee will not be considered to have made an expenditure when members of the media and government-provided security personnel pay the service provider directly for their portion of the travel as permitted under 11 CFR 100.93(b)(3). Travel on aircraft provided by a Federal, State or local government entity is addressed in new 11 CFR 113.5(a)(3), consistent with new 11 CFR 100.93(e)(1) (government conveyance). Travel on candidate-owned aircraft is addressed below.

The Commission received no comments specifically addressing new 11 CFR 113.5(a).

##### B. New 11 CFR 113.5(b)—House Candidates

As noted above, HLOGA prohibits House candidates and their authorized committees and leadership PACs from spending campaign funds on private, non-commercial air travel. 2 U.S.C. 439a(c)(2). Instead, House candidates must spend campaign funds on air travel only for commercial air travel, or for travel on aircraft owned by the candidate or the candidate's immediate family member, or for flights operated by the Federal government or a State or local government. Because House candidates, State congressional committees, and their leadership PACs are prohibited from spending campaign funds on non-commercial travel, other than travel permitted under 11 CFR 100.93(a) (government conveyance) or 11 CFR 100.93(g) (aircraft owned or leased by a candidate or a candidate's immediate family member), the new rule at 11 CFR 113.5(b) also prohibits House candidates from accepting in-kind contributions in the form of non-commercial air travel. In the NPRM, the Commission requested comment and received one comment, which expressed support. Accordingly, the Commission is implementing this proposal in new 11 CFR 113.5(b)(1) and (2). Paragraph (b)(1) contains the same "commercial exception" as is set forth in 11 CFR 113.5(a)(1), discussed above. Travel on government-provided aircraft is reflected in paragraph (b)(2). Travel on candidate-owned aircraft is addressed below.

##### C. New 11 CFR 113.5(c)—Exception for Aircraft Owned or Leased by Candidates and Immediate Family Members of Candidates

As noted above, the restrictions on expenditures in HLOGA do not apply to travel aboard aircraft that are owned or leased by a candidate or the candidate's immediate family members, including aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that the entity is not a "public corporation," and the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows." 2 U.S.C. 439a(c)(3)(A).

New 11 CFR 113.5(c)(1) implements this statutory provision and cross-references the definition of "proportional share of ownership" in 11 CFR 100.93(g)(3). New 11 CFR 113.5(c)(2) states that candidates and immediate family members will be considered to own or lease aircraft under the conditions described in 11 CFR 100.93(g)(2), namely, when there is an ownership interest in an entity (other than a public corporation) that owns the aircraft. New 11 CFR 113.5(c)(3) cross-references the definition of "immediate family member" in 11 CFR 100.93(g)(4). The Commission received no comments specifically addressing 11 CFR 113.5(c) as proposed in the NPRM.

##### D. New 11 CFR 113.5(d)—In-kind Contribution

New 11 CFR 113.5(d) states that the unincurred value of transportation provided to any campaign traveler (as defined in 11 CFR 100.93(a)(3)(i)), is an in-kind contribution from the service provider to the candidate or political committee on whose behalf, or with whom, the campaign traveler traveled, and that such contributions are subject to the limits, prohibitions, and reporting requirements of the Act. As noted above, House candidates are generally prohibited from receiving such contributions. The Commission received no comments specifically addressing 11 CFR 113.5(d) as proposed in the NPRM and is adopting the rule proposed in the NPRM.

##### E. Change of Title for 11 CFR Part 113

Along with adding new 11 CFR 113.5, which implements new 2 U.S.C. 439a(c), the Commission is changing the title of Part 113. The former title, "Use of Campaign Accounts for Non-Campaign Purposes," does not encompass new section 113.5, which governs use of campaign funds for

10044283130

campaign travel. The new title for Part 113 is "Permitted and Prohibited Uses of Campaign Accounts." The Commission received no comments addressing this change and is adopting the rule proposed in the NPRM.

**V. Publicly-Financed Presidential and Vice-Presidential Candidates—11 CFR 9004.7 and 9034.7**

Although HLOGA does not amend either the Presidential Election Campaign Fund Act (Fund Act) (28 U.S.C. 9001 et seq.) or the Presidential Primary Matching Payment Account Act (Matching Payment Act) (28 U.S.C. 9031 et seq.), the Commission proposed in the NPRM to make certain amendments to its regulations implementing these laws to conform them to the changes it proposed to 11 CFR 100.93. The Commission received no comments regarding these proposals and is implementing them without change from the NPRM.

Sections 9004.7 and 9034.7 are substantively identical, worded regulations promulgated under the authority of the Fund Act and the Matching Payment Act, respectively, and encompass 11 CFR 100.93. Both regulations prescribe the procedures that publicly funded primary and general election presidential campaigns must follow in attributing their travel expenses to campaign-related and to non-campaign-related activities. The Commission is making the following technical amendments to these regulations.

**A. Aircraft**

Revised 11 CFR 9004.7(b)(5)(i), (ii), and (v), and 11 CFR 9034.7(b)(5) replace the word "airplane" with the word "aircraft." These changes conform the regulations to the terminology in HLOGA, as well as revised 11 CFR 100.93 and new 11 CFR 115.5.

**B. Recordkeeping Requirements**

Former 11 CFR 9004.7(b)(5)(v) and 11 CFR 9034.7(b)(5)(v) required the authorized committee of presidential and vice-presidential candidates to maintain documentation of the lowest unrestricted non-discounted airfare as required in former 11 CFR 100.93(j)(1) or (2). Former sections 100.93(j)(1) and (2) contained recordkeeping requirements relating to rates of reimbursement provided in former 11 CFR 100.93(e) and (e). Revised 11 CFR 100.93, however, replaces the old reimbursement rate for non-commercial air travel by presidential and vice-presidential candidates with a rate based on the "per rate shown per campaign traveler" of the normal and

usual charter fare or rental charge for travel on a comparable aircraft of comparable size, and sets out the corresponding recordkeeping requirements in 11 CFR 100.93(j)(1). The Commission is therefore revising 11 CFR 9004.7(b)(5)(v) and 11 CFR 9034.7(b)(5)(v) to conform them to the new recordkeeping requirements in amended 11 CFR 100.93(j)(1). The Commission is also amending the final sentence in sections 9004.7(b)(5)(v) and 9034.7(b)(5)(v), which address recordkeeping requirements for travel on other conveyances to reflect that the recordkeeping requirements for other conveyances are now addressed in 11 CFR 100.93(k)(3).

**C. 11 CFR 9004.7(b)(8) and 11 CFR 9034.7(b)(8)—Conforming Changes in Terminology**

The Commission is revising 11 CFR 9004.7(b)(8) and 9034.7(b)(8) to conform the terminology to that used in new 2 U.S.C. 430a(c) and in revised 11 CFR 100.93. Former 9004.7(b)(8) and 9034.7(b)(8) used the same terminology as former section 100.93 in describing aircraft that are "licensed for compensation or hire" under various FAA certification authorities. Revised 11 CFR 100.93 defines the term "non-commercial travel," and uses the term "aircraft" instead of "airplane." Accordingly, revised 11 CFR 9004.7(b)(8) and 11 CFR 9034.7(b)(8) state that (until a non-commercial aircraft is governed by 11 CFR 100.93 and that the term "non-commercial travel" is defined in accordance with 11 CFR 100.93(a)(3)(v).

**Certification of No Effect Pursuant to 5 U.S.C. 552(b)**

**[Regulatory Flexibility Act]**

The Commission certifies that the attached rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities are affected by these final rules, which impose obligations only on Federal candidates, their campaign committees, other individuals traveling in connection with Federal elections, and the political committees on whose behalf this travel is conducted. Federal candidates, their campaign committees, and most political party committees and other political committees entitled to rely on these rules are not small entities. These rules generally clarify or supplement existing rules and are largely intended to implement a statutory directive and simplify the process of determining reimbursement rates. The rules do not impose

compliance costs on any service providers (as defined in the rules) that are small entities so as to cause a significant economic impact. With respect to the determination of the amount of reimbursement for travel, the new rules merely reflect an extension of existing similar rules. To the extent that operators of air-taxi services or scheduled air charter services are small entities indirectly impacted by these rules, any economic effects would result from the travel choices of individual candidates or other travelers rather than Commission requirements and, in any event, are likely to be less than \$100,000,000 per year.

**List of Subjects**

**11 CFR Part 100**  
Elections.

**11 CFR Part 113**

Campaign funds, Political candidates.

**11 CFR Part 9004**

Campaign funds.

**11 CFR Part 9034**

Campaign funds; Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Federal Election Commission is amending subchapters A, E, and F of chapter I of title 11 of the Code of Federal Regulations as follows:

**PART 100—SCOPE AND REFINEMENTS (2 U.S.C. 431)**

■ 1. The authority citation for part 100 is revised to read as follows:

Authority: 2 U.S.C. 431, 434, 435(a)(8), and 435a(c).

\* \* \* \* \*

■ 2. Section 100.98 is revised to read as follows:

**100.98 Travel by aircraft or other means of transportation.**

**(a) Scope and definitions.**

(1) This section applies to all campaign travelers who use non-commercial travel.

(2) Campaign travelers who use commercial travel, such as a commercial airline flight, charter flight, taxi, or an automobile provided by a small company, are governed by 11 CFR 100.53(a) and (d), not this section.

(3) For the purposes of this section:

**(i) Campaign traveler means:**

(A) Any candidate traveling in connection with an election for Federal office or any individual traveling in connection with an election for Federal office on behalf of a candidate or political committee; or

(B) Any member of the news media traveling with a candidate.

(1) *Service provider* means the owner of an aircraft or other conveyance, or a person who leases an aircraft or other conveyance from the owner or otherwise obtains a legal right to the use of an aircraft or other conveyance, and who uses the aircraft or other conveyance to provide transportation to a campaign traveler. For a jointly owned or leased aircraft or other conveyance, the service provider is the person who makes the aircraft or other conveyance available to the campaign traveler.

(1B) *Unreimbursed value* means the difference between the value of the transportation service provided, as set forth in this section, and the amount of payment for that transportation service by the political committee or campaign traveler to the service provider within the time limits set forth in this section.

(iv) *Commercial travel* means travel aboard:

(A) An aircraft operated by an air carrier or commercial operator certificated by the Federal Aviation Administration, provided that the flight is required to be conducted under Federal Aviation Administration air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority, provided that the flight is required to be conducted under air carrier safety rules; or

(B) Other means of transportation operated for commercial passenger service.

(v) *Non-commercial travel* means travel aboard any conveyance that is not commercial travel, as defined in paragraph (a)(3)(iv) of this section.

(vi) *Comparable aircraft* means an aircraft of similar make and model as the aircraft that annually makes the trip, with similar equipment as that aircraft.

(b) *General rule.*

(1) No contribution is made by a service provider to a candidate or political committee if:

(i) Every candidate's authorized committee or other political committee on behalf of which the travel is conducted pays the service provider, within the required time, for the full value of the transportation, as determined in accordance with paragraphs (c), (d), (e) or (f) of this section, provided to all campaign travelers who are traveling on behalf of that candidate or political committee; or

(ii) Every campaign traveler for whom payment is not made under paragraph (b)(1)(i) of this section pays the service provider for the full value of the transportation provided in that

campaign traveler as determined in accordance with paragraphs (c), (d), (e) or (f) of this section. See 11 CFR 100.79 and 100.139 for treatment of certain unreimbursed transportation expenses incurred by individuals traveling on behalf of candidates, authorized committees, and political committees of political parties.

(2) Except as provided in 11 CFR 100.79, the unreimbursed value of transportation provided to any campaign traveler, as determined in accordance with paragraphs (c), (d) or (e) of this section, is an in-kind contribution from the service provider to the candidate or political committee on whose behalf, or with whom, the campaign traveler is traveling. Contributions are subject to the reporting requirements, limitations, and prohibitions of the Act.

(3) When a candidate is accompanied by a member of the news media, or by security personnel provided by any Federal or State government, the news media or government security provider may reimburse the political committee paying for the passage above of the travel by the member of the media or security personnel, or may pay the service provider directly for that portion share, up to the applicable amount set forth in paragraphs (c)(1), (c)(3), (d), (e), or (f) of this section. A payment made directly to the service provider may be subtracted from the amount for which the political committee is otherwise responsible without any contribution resulting. No contribution results from reimbursement by the media or a government security provider to a political committee in accordance with this paragraph.

(c) *Travel on aircraft.* When a campaign traveler uses aircraft for non-commercial travel, other than a government aircraft described in paragraph (a) of this section, one candidate or family owned aircraft described in paragraph (g) of this section, reimbursement must be provided no later than seven (7) calendar days after the date the flight began at one of the following rates to avoid the receipt of an in-kind contribution:

(1) *Travel by or on behalf of Senate, presidential, or vice-presidential candidates.* A Senator, presidential, or vice-presidential candidate, or his or her family, or any person traveling on behalf of such candidate or the candidate's authorized committee must pay the pro rata share per campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size. The pro rata share shall be calculated by

dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of such candidates or their authorized committees, including members of the news media, and security personnel traveling with a candidate. No portion of the normal and usual charter fare or rental charge may be attributed to any campaign traveler that are not traveling on behalf of such candidates or their authorized committees, or any other passengers, except as permitted under paragraph (b)(3) of this section.

(2) *Travel by or on behalf of House candidates and their leadership PACs.* Except as otherwise provided in paragraphs (e) and (f) of this section, a campaign traveler paid in a candidate's election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, or a person traveling on behalf of any such candidate or any authorized committee or leadership PAC of such candidate, is prohibited from non-commercial travel on behalf of any such candidate or any authorized committee or leadership PAC of such candidate.

(3) *Other campaign travelers.* When a candidate's authorized committee pays for a flight pursuant to paragraph (c)(1) of this section, no payment is required from other campaign travelers on that flight. Otherwise, a campaign traveler not covered by paragraphs (c)(1) or (b)(2) of this section, including persons traveling on behalf of a political party committee, separate organized fund, unconnected political committee, or a leadership PAC of a candidate for election for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, must pay the service provider no less than the following for each leg of the trip:

(i) In the case of travel between cities served by regularly scheduled first-class commercial airline service, the lowest unrestricted and non-discounted first-class airfare;

(ii) In the case of travel between a city served by regularly scheduled coach commercial airline service, but not regularly scheduled first-class commercial airline service, and a city served by regularly scheduled coach commercial airline service (with or without first-class commercial airline service), the lowest unrestricted and non-discounted coach airfare; or

(iii) In the case of travel to or from a city not served by regularly scheduled commercial airline service, the normal and usual charter fare or rental charge for a comparable commercial aircraft of sufficient size to accommodate all

10044283132



campaign travelers, and security personnel, if applicable.

(c) *Other means of transportation.* If a campaign traveler uses any means of transportation other than an aircraft, including an automobile, or train, or boat, the campaign traveler, or the political committee on whose behalf the travel is conducted, must pay the service provision within thirty (30) calendar days after the date of receipt of the invoice for such travel, but not later than sixty (60) calendar days after the date the travel began, at the normal and usual fare or rental charge for a comparable commercial conveyance of sufficient size to accommodate all campaign travelers, including members of the news media traveling with a candidate and security personnel, if applicable.

(e) *Government conveyances.*

(1) *Travel by or on behalf of candidates, their authorized committees, or House candidate Leadership PACs.* If a campaign traveler traveling on behalf of a candidate, an authorized committee, or the Leadership PAC of a House candidate uses an aircraft that is provided by the Federal government, or by a State or local government, or the political committee on whose behalf the travel is conducted, must pay the government entity, within the time specified by that government entity, either:

(i) The pro rata share per campaign traveler of the normal and usual charter fare or rental charge for the flight on a comparable aircraft of sufficient size to accommodate all campaign travelers. The pro rata share shall be calculated by dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of candidates, authorized committees, or House candidate Leadership PACs, including members of the news media, and security personnel, if applicable. No portion of the normal and usual charter fare or rental charge may be allocated to any other campaign travelers or any other passengers, except as permitted under paragraph (b)(3) of this section. For purposes of this paragraph, the comparable aircraft need not accommodate any passengers, including personnel and equipment; or

(ii) The private traveler reimbursement rate, as specified by the governmental entity providing the aircraft, per campaign traveler.

(2) *Other campaign travelers.* When a candidate's authorized committee, or a House candidate's Leadership PAC pays for a flight pursuant to paragraph (e)(1) of this section, no payment is required

from any other campaign travelers on that flight. Otherwise, a campaign traveler not covered by paragraph (e)(1) of this section, including persons traveling on behalf of a political party committee, separate segregated fund, nonconnected political committee, or a leadership PAC other than a leadership PAC of a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, must pay the government entity, within the time specified by that government entity, either:

(i) For travel to or from a military airbase or other location not accessible to the general public, the lowest unrestricted and non-discounted first-class airfare to or from the city with regularly scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used; or

(ii) For all other travel, in accordance with paragraph (c)(8) of this section.

(3) If a campaign traveler uses a conveyance, other than an aircraft, that is provided by the Federal government, or by a State or local government, the campaign traveler, or the political committee on whose behalf the travel is conducted, must pay the government entity in accordance with paragraph (d) or this section.

(f) *Date and public availability of payment rate.* For purposes of paragraphs (e), (d), (f), and (g) of this section, the payment rate must be the rate available to the general public for the date traveled or within seven (7) calendar days thereof. The payment rate must be determined by the time the payment is due under paragraph (c), (d), (e) or (g) of this section.

(g) *Aircraft owned or leased by a candidate or a candidate's immediate family member.*

(1) For non-commercial travel by a candidate, or a person traveling on behalf of a candidate, on an aircraft owned or leased by that candidate or an immediate family member of that candidate, the candidate's authorized committee must pay:

(i) In the case of travel on an aircraft that is owned or leased under a shared-ownership or other time-share arrangement, where the travel time will exceed the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the hourly, mileage, or other applicable rate charged the candidate, immediate family member, or other service provider for the costs of the travel; or

(ii) In the case of travel on an aircraft that is owned or leased under a shared-ownership or other time-share

arrangement, where the travel exceeds the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the rate specified in paragraph (c) of this section (House candidates are prohibited from engaging in such travel); or

(iii) In the case of travel on an aircraft that is not owned or leased under a shared-ownership or other time-share arrangement, the pro rata share per campaign traveler of the costs associated with the trip. Associated costs include, but are not limited to, the cost of fuel and crew, and a proportionate share of maintenance costs.

(2) A candidate, or an immediate family member of the candidate, will be considered to own or lease an aircraft under paragraph (g)(1) of this section if the candidate or the immediate family member of the candidate has an ownership interest in an entity that owns the aircraft, provided that the entity is not a corporation with publicly traded shares.

(3) A proportional share of the ownership interest in an aircraft means the amount of the share by which the candidate or immediate family member is entitled under an ownership or lease agreement. Prior to each flight, the candidate's committee must obtain a certification from the service provider that the candidate's planned use of the aircraft will not exceed the candidate's or immediate family member's proportional share of use under the ownership or lease agreement. See paragraph (j) of this section for related recordkeeping requirements.

(4) For the purposes of this section, an "immediate family member" of a candidate is the father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law of the candidate.

(h) *Presumption.* In all regions, State and local law enforcement with respect to travel in connection with a Federal election to the extent they purport to supplement the rules or timing requirements of 11 CFR 100.93.

(i) *Reporting.*

(1) In accordance with 11 CFR 100.13, a political committee on whose behalf the unreimbursed travel is conducted must report the receipt of an in-kind contribution and the making of an expenditure under paragraph (b)(2) of this section.

(2) When reporting a disbursement for travel services in accordance with this section, a political committee on whose behalf the travel is conducted must report the actual date of travel for which the disbursement is made in the "purpose of disbursement" field.



**(1) Recordkeeping.**

(1) For travel on non-commercial aircraft conducted under paragraphs (c)(1), (c)(3)(ii), (e)(1), or (a) of this section, the political committee on whose behalf the travel is conducted shall maintain documentation of:

(2) The service provider and the size, model, make and tail number (or other unique identifier for military aircraft) of the aircraft used;

(ii) An itinerary showing the departure and arrival cities and the date(s) of departure and arrival, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign travelers or security personnel; and

(iii) (A) The rate for the campaign charter aircraft available in accordance with paragraphs (c), (e) and (f) of this section, including the airline, charter or air taxi operator, and travel service, if any, offering that fare to the public, and the dates on which the rates are based; or

(B) The private traveler reimbursement rate available in accordance with paragraph (e)(1)(ii) of this section, and the dates on which the rate is based.

(iv) Where the travel is aboard an aircraft owned in part by the candidate or an immediate family member of the candidate, the ownership or lease agreement specifying the amount of use of the aircraft corresponding to the candidate's or an immediate family member's ownership interest in the aircraft, as required by paragraph (g)(1)(i) and (ii) and (g)(3) of this section, and the certification required by paragraph (g)(3) of this section.

(2) For travel on non-commercial aircraft conducted under paragraph (c)(3)(i), (c)(3)(ii), or (e)(2)(i) of this section, the political committee on whose behalf the travel is conducted shall maintain documentation of:

(i) The service provider and the size, model, make and tail number (or other unique identifier for military aircraft) of the aircraft used;

(ii) An itinerary showing the departure and arrival cities and the date(s) of departure and arrival, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign travelers; and

(iii) The lowest unrestricted non-discounted airline available in accordance with paragraphs (c)(3), (e)(2)(i), and (f) of this section, including the airline offering that fare, flight number, travel service, if any, providing that fare, and the dates on which the rates are based.

(3) For travel by other conveyances, the political committee on whose behalf the travel is conducted shall maintain documentation of:

(i) The service provider and the size, model and make of the conveyance used;

(ii) An itinerary showing the departure and destination locations and the date(s) of departure and arrival, a list of all passengers on such trip, along with a designation of which passengers are and which are not campaign travelers or security personnel; and

(iii) The commercial fare or rental charge available in accordance with paragraphs (d) and (h) of this section for a comparable commercial conveyance of sufficient size to accommodate all campaign travelers including members of the travel media traveling with a candidate, and security personnel, if applicable.

#### **PART 113—PERMITTED AND PROHIBITED USES OF CAMPAIGN ACCOUNTS**

§ 3. The heading of Part 113 is retained to read as set forth above.

§ 4. The authority citation for part 113 continues to read as follows:

Authority: 2 U.S.C. 4302(a), 4302(b), 4302(c), 441a.

§ 5. Section 113.5 is added to read as follows:

§ 113.5 Prohibition on use of campaign funds for flights on noncommercial aircraft (2 U.S.C. 4302(e)).

(a) *Presidential, vice-presidential and Senate candidates.* Notwithstanding any other provision of the Act or Commission regulations, a presidential, vice-presidential, or Senate candidate, and any authorized committee of such candidate, shall not make any expenditure for travel on an aircraft unless the flight is:

(1) Commercial travel as provided in 11 CFR 100.93(a)(3)(iv);

(2) Noncommercial travel as provided in 11 CFR 100.93(a)(3)(v), and the pro rata share per campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size, as provided in 11 CFR 100.99(c), is paid by the candidate, the authorized committee, or other political committee on whose behalf the travel is conducted, to the owner, lessee, or other person who provides the aircraft within seven calendar days after the date the flight began, except as provided in 11 CFR 100.93(b)(3); or

(3) Provided by the Federal government or by a State or local government.

(b) *House candidates and their leadership PACs.* Notwithstanding any other provision of the Act or Commission regulations, a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, and any authorized committee or leadership PAC of such candidate, shall not make any expenditures, or receive any in-kind contributions, for travel on an aircraft unless the flight is:

(1) Commercial travel as provided in 11 CFR 100.93(a)(3)(iv); or

(2) Provided by the Federal government or by a State or local government.

(c) *Exception for aircraft owned or leased by candidate, and immediate family members of candidates.*

(1) Paragraphs (a) and (b) of this section do not apply to flights on aircraft owned or leased by the candidate, or by an immediate family member of the candidate, provided that the candidate does not use the aircraft more than the candidate's or immediate family member's proportional share of ownership, as defined by 11 CFR 100.93(g)(3), herein.

(2) A candidate, or an immediate family member of the candidate, will be considered to own or lease an aircraft under the conditions described in 11 CFR 100.93(g)(2).

(3) An "immediate family member" is defined in 11 CFR 100.96(g)(4).

(d) *In-kind contributions.* Except as provided in 11 CFR 100.79, the unreimbursed value of transportation provided to any campaign traveler is an in-kind contribution from the service provider to the candidate or political committee on whose behalf, or with whom, the campaign traveler traveled. Such contributions are subject to the reporting requirements, limitations and prohibitions of the Act.

#### **PART 8004—STATEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS; USE OF PAYMENTS**

§ 6. The authority citation for part 8004 continues to read as follows:

Authority: 26 U.S.C. 9004 and 9005(a).

§ 7. Section 8004.7 is amended by revising paragraphs (b)(5)(i), (b)(5)(iii), (b)(5)(v), and (b)(8) to read as follows:

§ 8004.7 Allocation of travel expenditures.

(b) \* \* \*

(5) (i) If any individual, including a candidate, uses a government aircraft for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an

10044283134

amount equal to the applicable rate set forth in 11 CFR 100.93(a).

(iii) If any individual, including a candidate, uses a government conveyance, other than an aircraft, for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the amount required under 11 CFR 100.93(d).

(v) For travel by aircraft, the committee shall maintain documentation as required by 11 CFR 100.93(j)(1) in addition to any other documentation required in this section. For travel by other conveyances, the committee shall maintain documentation of the commercial rental rate as required by 11 CFR 100.93(j)(3) in addition to any other documentation required in this section.

(8) Non-commercial travel, as defined in 11 CFR 100.93(a)(3)(v), on aircraft, and travel on other means of transportation not operated for commercial passenger service, is governed by 11 CFR 100.93.

#### PART 9034—ENTITLEMENTS

§ 9034.1 The authority cited for part 9034 continues to read as follows:

Authority: 26 U.S.C. 9034 and 9039(b).

§ 9034.2 Section 9034.7 is amended by revising paragraphs (b)(iii), (b)(iv), (b)(v), and (b)(vi) to read as follows:

§ 9034.7 Allocation of travel expenses.

(b) . . .

(5) (i) If any individual, including a candidate, uses a government aircraft for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount not less than the applicable rate set forth in 11 CFR 100.93(a).

(iii) If any individual, including a candidate, uses a government conveyance, other than an aircraft, for campaign-related travel, the candidate's authorized committee shall pay the appropriate government entity an amount equal to the amount required under 11 CFR 100.93(d).

(v) For travel by aircraft, the committee shall maintain documentation as required by 11 CFR 100.93(j)(1) in addition to any other documentation required in this section. For travel by other conveyances, the committee shall maintain documentation of the commercial rental

rate as required by 11 CFR 100.93(j)(3) in addition to any other documentation required in this section.

(8) Non-commercial travel on aircraft, and travel on other means of transportation not operated for commercial passenger service is governed by 11 CFR 100.93.

Dated: November 25, 2009.

On behalf of the Commission.

Steven T. Weiler,

Chairman, Federal Election Commission.

[FR Doc. 99-24637 Filed 12-4-09; 8:45 am]

WILLIS CODE 9716-01-7

#### DEPARTMENT OF TRANSPORTATION

##### Federal Aviation Administration

##### 14 CFR Part 23

[Pocket No. 01001; Special Conditions No. 23-241-SC]

Special Conditions: Embraer S.A., Model EMB-505; High Fuel Temperature

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Embraer S.A., Model EMB-505 airplane. This airplane will have a novel or unusual design feature(s) associated with high fuel temperature. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is December 1, 2009. We must receive your comments by January 8, 2010.

ADDRESSES: You must submit two copies of your comments to: Federal Aviation Administration, Regional Counsel, ACE-7, Attention: Rules Docket Clerk, Docket No. CE301, Room 506, 901 Locust, Kansas City, Missouri 64108. Mark comments: Docket No. CE301. You may inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m. FOR FURTHER INFORMATION CONTACT: Peter L. Reese, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE-111, 901 Locust, Kansas City,

Missouri, 816-329-4135, fax 816-329-4080.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval and thus delivery of the aircraft. In addition, the issuance of these special conditions is subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

#### Comments Invited

We invite interested people to take part in this rulemaking by sending written data, views, or arguments as they may desire. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the ADDRESSES section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of the comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

#### Discussion

#### Background

On October 9, 2008, Embraer S.A. applied for a type certificate for their new Model EMB-505. The Model EMB-505 is a commuter category, low-winged monoplane with "T" tailed vertical and horizontal stabilizers, retractable tricycle type landing gear and twin turbofan engines mounted on the aircraft fuselage. Its design characteristics include a pondurance